Against Physician or Surgeon by Hospital, 37 A.L.R.3d 645 (1971 & Supp. 1990), especially § 3 thereof.

A very comprehensive discussion of the propriety of judicial review of the internal affairs of private associations is contained in Note, Developments in the Law--Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983 (1963).

[9]But see Sarin v. Samaritan Health Center, 176 Mich. App. 790, 793-95, 440 N.W.2d 80, 82-83 (1989) (no judicial review of private hospital's decision to terminate medical staff privileges, not even to ensure compliance with medical staff bylaws' methods for reaching that decision); Medical Center Hospitals v. Terzis, 235 Va. 443, 445-46, 367 S.E.2d 728, 729-30 (1988), as modified upon grant of reh'g (statute on judicial review of hospitals' decisions adversely affecting existing medical staff members' privileges does not authorize judicial review of procedures employed by hospitals in reaching such decisions, as long as hospitals' decisions are in writing and are based upon certain statutorily permitted reasons).

[10]Under the Federal Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101-11152, as amended, both public and private hospitals are encouraged to comply with that Act's standards for adequate notice and fair hearing with respect to health care peer review, in order to be immune generally from monetary damages. See generally Colantonio, The Health Care Quality Improvement Act of 1986 and Its

Impact on Hospital Law, 91 W. Va. L. Rev. 91 (1988). This federal legislation generally applies to immunize against any state civil liability for damages pertaining to health care peer review actions commenced on or after October 14, 1989. 42 U.S.C. § 11111(c)(1) (1988).

[11] In an opinion involving events prior to the effective date of the Federal Health Care Quality Improvement Act of 1986, the Supreme Court of the United States observed that the review by a state's judiciary of medical peer review decisions typically is of a very limited nature; a court usually would not address the merits but would ensure that a reasonable procedure was afforded and that there was evidence from which it could be found that the professional conduct posed a threat to patient care. Patrick v. Burget, 486 U.S. 94, 104-05, 108 S.Ct. 1658, 1665, 100 L. Ed. 2d 83, 94 (1988).

[12] See supra note 4. As stated therein, this Court disagrees with Dr. Mahmoodian on this point.

[13] Documentary evidence, without any testimonial evidence, may be a fair procedure in some medical peer review hearings. See Woodbury v. McKinnon, 447 F.2d 839, 844 (5th Cir. 1971).

[14] In McElhinney, the court concluded that the bylaw there was impermissibly vague. Unlike here, however, the bylaw in McElhinney condemned only "gross unethical or moral misconduct[.]" 544 S.W.2d at 218. The court believed such broad language did not give sufficient notice that the

inability to work with other physicians was proscribed. It stated, though, that it "express[ed] no opinion as to the validity of a reasonably definite standard undertaking to proscribe and make a cause of termination [the] inability to work in harmony with other hospital personnel." Id. The opinion also noted that the physician's abrasive conduct could not in that case be regarded in any manner as detrimental to patient care. Id. at 217.

[15] A disruptive health care practitioner has been defined as follows:

> The disruptive practitioner is by definition, contentious, threatening, unreachable, insulting and frequently litigious. He will not, or cannot, play by the rules, nor is he able to relate to or work well with others. . . . This practitioner often falls within the classification of the impaired or sick physician, in that the underlying reason for the practitioner's abusive conduct may be a mental or emotional problem. However, that is not always the case. Sometimes the person is simply a disruptive or abrasive human being.
>
> The manifestation of disruptive behavior sometimes takes bizarre forms. The disruptive practitioner is often clinically competent. Indeed, he will believe himself to be more competent than others on the

medical staff. It is not uncommon to find that a disruptive practitioner is, in fact, highly intelligent, clinically superior, even medically outstanding. However, the reason for his disruptiveness, his inability to get along with others, sometimes affects his clinical judgment. He is totally convinced that he is right. Those who would question him or seek to have him behave differently, whether they are colleagues or not, are seen to be motivated by ignorance, stupidity, jealousy or a desire to destroy him as an economic competitor. They are also believed to be weak and vulnerable. In fact, the objects of his unacceptable behavior are most frequently those who, by virtue of their positions, are weak and vulnerable. He may not openly take on the strong and prestigious, but rather seek to undermine and intimidate those who can neither avoid him nor fight back. For these reasons, and regardless of what may cause him to act as he does, he is a formidable person.

. . . Only when personal idiosyncrasies, as expressed in words or deeds, begin to affect the ability of others to get their jobs done, or impinge on their right to go about their own business free of burdensome harassment, or when such idiosyncracies begin to interfere

> with the practitioner's ability to perform well professionally, is action by the hospital indicated.

Springer & Casale, Hospitals and the Disruptive Health Care Practitioner--Is the Inability to Work with Others Enough to Warrant Exclusion?, 24 Duq. L. Rev. 377, 383-85 (1985) (footnotes omitted).

On the record before us, this description of disruptive conduct aptly specifies Dr. Mahmoodian's continuously vituperative and uncooperative behavior. At the root of his constant harassment of colleagues, registered nurses and patients at the hospital is the deep-seated animosity between Dr. Mahmoodian and another obstetrician/gynecologist on UHC's medical staff, Dr. Rahimian. The conduct of the latter has been investigated by the medical staff on a few occasions, too.

[16] We do not address the issue raised by the amicus brief of the West Virginia Association of Nurse Anesthetists and the West Virginia Psychological Association. That issue involves the scope of judicial review of a private hospital's decision denying initial staff appointments to individuals who are not allopathic (conventional) physicians.

APPENDIX B

IN THE CIRCUIT COURT OF

HARRISON COUNTY, WEST VIRGINIA

SAEED MAHMOODIAN, M.D.,

Plaintiff,

v. / / Civil Action No. 89-C-25-1

UNITED HOSPITAL CENTER, INC.,
BRUCE C. CARTER, ALI RAHIMIAN, M.D.
and FLORENCIA C. LOPEZ, M.D.,

Defendants.

ORDER

On the 29th day of November, 1989, came the plaintiff, Saeed Mahmoodian, M.D. by his attorney, Jerald E. Jones, and came the defendants United Hospital Center, Inc. ("UHC") and Bruce C. Carter by their attorneys, Herbert G. Underwood and Irene M. Keeley, pursuant to the request of the plaintiff for permanent injunctive relief against the defendant United Hospital

Center. The original complaint sought a complete restoration of plaintiff's privileges as a medical staff appointee at UHC, including the restoration of the privilege to do Wertheim ("radical") hysterectomies. The plaintiff now seeks only a return of all such privileges other than the privilege to perform Wertheim ("radical") hysterectomies.

By Order dated February 1, 1989, this Court denied the plaintiff's motion for a preliminary injunction enjoining the defendant, United Hospital Center, Inc., from terminating the active staff privileges of the plaintiff whereupon the plaintiff, pursuant to W. Va. Code § 53-5-5, petitioned the West Virginia Supreme Court of Appeals for such preliminary injunctive relief.

By Order dated April 18, 1989, the West Virginia Supreme Court of Appeals, without stating any grounds therefor, granted the plaintiff a preliminary injunction and remanded the matter for further proceedings before the Circuit Court of Harrison County. This Court then denied the defendants' Motion to Dissolve the Preliminary Injunction granted by the Supreme Court.

Thereafter, by Order dated June 30, 1989, upon the joint application of the parties, this Court certified certain threshold questions to the Supreme Court in order to conduct further proceedings in this case as follows:

1. Is United Hospital Center, Inc., a private, not for profit hospital or is it a de facto public hospital?

   Ruling of the Circuit Court of Harrison County:

United Hospital Center, Inc. is a private, not for profit hospital.

2. Is there a distinction between the rights of a physician to staff privileges at a private hospital as opposed to a hospital operated by a governmental subdivision or agency?

Ruling of the Circuit Court of Harrison County:

Yes.

3. Is the decision of the Board of Directors of United Hospital Center, Inc. in terminating staff privileges of a physician subject to judicial review?

Ruling of the Circuit Court of Harrison County:

Yes.

4. If so, is such judicial review limited to whether the hospital procedurally complied with its bylaws or may the Court go beyond the procedural aspect and look to the subject matter and substance of the proceeding to determine if there was substantive due process?

Ruling of the Circuit Court of Harrison County:

Judicial review is limited to whether the hospital procedurally complied with its bylaws.

5. Where the medical staff bylaws of a private, not for profit hospital, operated in the manner of United Hospital Center, Inc., provides that one of the grounds for termination of staff privileges is disruptive behavior or unprofessional conduct, can the hospital terminate the staff privileges of a physician on those grounds alone or must there be a showing that the behavior complained of has a substantial adverse effect upon patient care?

Ruling of Circuit Court of Harrison County:

> The hospital may terminate the staff privileges of a physician if, in compliance with its bylaws, it determines that a physician has engaged in behavior or unprofessional conduct disruptive to the normal functioning of the hospital.

By Order dated July 5, 1989, the Supreme Court determined that the ruling of this Court upon the questions certified to this Court should not be reviewed and, therefore, refused to docket said certified

questions for hearing.

The plaintiff now seeks a permanent injunction enjoining the defendant, United Hospital Center, Inc., from terminating his active staff privileges.

Wherefore, in view of the Supreme Court's action in this matter granting the plaintiff a preliminary injunction after the denial of such injunction by this Court, the Court feels constrained to defer to the ruling of the West Virginia Supreme Court of Appeals and does, hereby, without any further findings of fact, ORDER that the plaintiff's Motion for permanent injunction enjoining the defendant, United Hospital Center, Inc., from terminating the active staff privileges of the plaintiff is GRANTED without prejudice to further proceedings in this matter.

The parties hereto object and except to the extent their respective interests are affected thereby.

By agreement of the parties, the injunction bond required by W. Va. Code §53-5-9 is hereby waived for the duration of this Order.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: /s/ November 30, 1989

/s/ Daniel L. McCarthy
Judge

APPROVED AS TO FORM ONLY:

BY: /s/ Herbert G. Underwood
HERBERT G. UNDERWOOD
Attorney for Defendants United
Hospital Center and Bruce Carter

BY: /s/ Jerald E. Jones
JERALD E. JONES
Attorney for Plaintiff
Saeed Mahmoodian, M.D.

Supreme Court, U.S.
FILED
AUG 15 1991
OFFICE OF THE CLERK

(2)

No. 91-138

IN THE
SUPREME COURT OF THE UNITED STATES

October, 1991, Term

SAEED MAHMOODIAN, M.D., Petitioner,

vs.

UNITED HOSPITAL CENTER, INC. AND
BRUCE C. CARTER, Respondents.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of Appeals
of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS TO OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 404 S.E.2d 750. A copy of the opinion also appears in the appendix ("A") to the petition for writ of certiorari.

The opinions of the Circuit Court of Harrison County, West Virginia, are not published. A copy of the final order of the circuit court, entered November 30, 1989, appears in the appendix ("B") to the petition for writ of certiorari. A copy of the initial decision of the circuit court, denying petitioner's motion for a preliminary injunction, entered February 1, 1989, is included in the appendix to this brief in opposition to petition for writ of certiorari.

STATEMENT OF THE CASE

By decision dated April 25, 1991, the West Virginia Supreme Court of Appeals (the "state court") sustained the action of United Hospital Center, Inc. ("UHC" or "the hospital"), taken upon the recommendation of its medical staff, to revoke the hospital privileges of Saeed Mahmoodian, M.D. ("Mahmoodian"). The state court's opinion appears in the appendix to the petition for writ of certiorari. The hospital's action was initially reviewed by the Circuit Court of Harrison County (the "trial court") during an evidentiary hearing on Mahmoodian's motion for a preliminary injunction. The trial court denied the motion, finding inter alia, that there was no likelihood of success on the merits. The trial court did grant limited and temporary relief to Mahmoodian for the benefit of patients then under his care.

The trial court's findings, conclusions, and order entered on February 1, 1989 are included in the appendix ("C") to this brief in opposition.

Thereafter, the state court granted without comment Mahmoodian's ex parte motion for a preliminary injunction. At a later date, the trial court sought without success to certify five legal questions for decision, but the state court refused to docket the certified questions, again without comment. On November 30, 1989, without taking any further evidence in the case, and in order to put the case in a posture for a final appeal on the merits, the trial court granted a permanent injunction against the hospital and in favor of Mahmoodian, acting in deference to the unexplained interlocutory actions of the state court. The hospital appealed to the state court which thereafter set aside

the trial court's permanent injunction and, in effect, affirmed the trial court's initial decision to deny Mahmoodian's motion for a preliminary injunction.

Mahmoodian's statement of the case miscasts the facts. He would have this Court believe he is the only physician in the Clarksburg area that treats indigent pregnant women. He would have this Court believe that Mahmoodian's peers found no fault whatsoever with his clinical/surgical abilities. He would have this Court believe he has been the model physician-colleague since the medical staff began its current investigation of his professional conduct. Finally, Mahmoodian would have this Court believe the motive of the medical staff and the hospital was to silence Mahmoodian's attacks upon substandard medical practices. None of these assertions are true. Mahmoodian has

sought to put this same "spin" on his case before his peers, before the board of directors of the hospital, before the Circuit Court of Harrison County during an evidentiary hearing, and before the West Virginia Supreme Court of Appeals, each time without success.

The facts are that Mahmoodian was not the sole source of medical services to indigent women in Harrison County needing obstetrical or gynecological services, and Mahmoodian's services to women at the health department's clinic were not altruistic. He received many of his patients through clinic referrals. The medical staff recommended that Mahmoodian's clinical privilege to perform the Wertheim procedure (a "radical" hysterectomy with removal of the pelvic lymph node chain) be withdrawn due to inexperience and incompetence even if his medical staff

privileges would not be revoked. Mahmoodian did not challenge that recommendation in the later stages of this case. Relations between Mahmoodian and the physicians and nurses of the obstetrical unit of the hospital did not materially change after the medical staff initiated corrective action against Mahmoodian. There were continuing revelations of Mahmoodian's disruptive conduct before the trial court and the state court. Finally, the hospital has denied throughout and denies here any improper motive toward Mahmoodian and relies upon the fact that his assertions of improper motive have been rejected at each stage of this proceeding.

The four other physicians privileged to practice obstetrics and gynecology at UHC did not participate at any stage of the peer review process in the recommendation of the medical staff to the hospital board

to revoke Mahmoodian's privileges. A list of the proceedings before the hospital and its medical staff is included in the appendix ("D") to this brief in opposition. Good cause for an investigation and then a hearing concerning Mahmoodian's professional conduct, and the reasons for revoking his medical staff privileges and withdrawing his clinical privilege to perform the Wertheim procedure, are set out in the report and recommendation of the ad hoc hearing committee of the medical staff, included in the appendix ("E") to this brief in opposition.

WHY A WRIT SHOULD NOT BE GRANTED

1. Each of the issues raised by the petitioner was fully briefed, discussed, and decided by the West Virginia Supreme Court of Appeals. This case is not of a special or important character. There is no conflict among the federal or state courts on the federal due process question raised by the petitioner; federal and state courts uniformly hold that a private hospital is not a state actor when it grants, denies or revokes medical staff privileges, and is not subject to the due process clause of the Fourteenth Amendment. Any conflict among the states concerns only the applicability of and compliance with a hospital's medical staff bylaws and the scope of judicial review of the hospital's decision, and arises from disparate interpretations of each state's common law, contract law, or public policy.

2. To the degree that public policy would be advanced by uniform peer review procedures for public and private hospitals alike, that public policy is being advanced by the United States Congress, and there is no need for this Court to act. Moreover, this would not be a proper case for the Court to act upon. The state court here did not rely upon the public hospital-private hospital dichotomy to guide its judicial review of the decision of the hospital and its medical staff to revoke the petitioner's medical staff privileges.

3. The remaining issues raised by the petitioner, to wit: the extent of cross-examination provided and the adequacy of the standard of proscribed conduct under the medical staff bylaws, were carefully considered by the state court. These present no legal issue of general applicability and do not merit the attention of this Court.

ARGUMENT

1.

United Hospital Center, Inc. ("UHC" or "the hospital") and Bruce Carter, respondents, oppose the petition for writ of certiorari of Saeed Mahmoodian, M.D.("Mahmoodian"). The petition falls outside the considerations governing review on writ of certiorari and raises no special or important issue sufficient in character to call forth this Court's jurisdiction. Mahmoodian is in error when he asserts that "case law and sound public policy demand" that this Court "abandon the private hospital-public hospital dichotomy and apply the due process protection of the Fourteenth Amendment to actions of hospitals in terminating, revoking or refusing medical staff privileges to a physician." (p. 13). The case law is not in conflict and public policy is being advanced by the United States Congress.

The West Virginia Supreme Court of Appeals (the "state court") refused to be drawn into a private hospital-public hospital debate. Instead, the state court based its judicial review upon an existing professional relationship between UHC and Mahmoodian. The state court reasoned:

> an extensive discussion of this public hospital/private hospital dichotomy distracts attention from more significant issues in this case. The limited record before us on the point supports the factual finding of the Circuit Court of Harrison County that UHC is a private hospital for purposes of personnel decisions. Our analysis will, therefore, be based upon UHC's private status.
>
> We do note that the scope of judicial review of health care peer review decisions adversely affecting the privileges of a medical staff member is essentially the same for private and public hospitals. While such decisions of public hospitals must be reached after affording "due process," and such decisions of private hospitals must be reached after affording "fair procedures," recent federal legislation would encourage essentially all

> hospitals to use the same procedures. See infra note 10 (discussing the Federal Health Care Quality Improvement Act of 1986, 82 U.S.C. §§ 11101-11152). (Emphasis in original). Note 2, A-52. [All references to the decision below will be to petitioner's Appendix A].

Concerning the scope of judicial review, the state court held:

> Utilizing breach of contract principles, most courts explicitly addressing the issue presented here have held, and we hereby hold, that the decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to insure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to insure that the medical staff bylaws afford basic notice and fair hearing procedures, including an impartial tribunal. (A-16).

Thereby, the West Virginia court joined a growing chorus of state courts that have granted limited judicial review of a private hospital's medical staff

decisions. Medical staff bylaws are the most common basis upon which most courts now undertake judicial review.[1] Some courts have undertaken judicial review based upon the public interest in the hospital's decision, the so-called "New Jersey rule" stated in Greisman v. Newcomb Hospital, 192 A.2d 817 (N.J. 1963).[2] California courts

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[1] Courtney v. Shore Memorial Hospital, 584 A.2d 817 (N.J. Super. 1990); Wong v. Garden Park Community Hospital, 565 So.2d 550 (Miss. 1990); Adkins v. Sarah Bush Lincoln Center, 544 S.E.2d 733 (Ill. 1989); Friedman v. Memorial Hospital of Southbend, Inc., 523 N.E.2d 252 (Ind. App. 1988); Pepple v. Parkview Memorial Hospital, 511 N.E.2d 467 (Ind. App. 1985); Yarnell v. Sisters of St Francis Health Sisters, 446 N.E.2d 359 (Ind. 1983); Even v. Longmont Hospital Association, 629 P.2d 1100 (Colo. 1981); Huffaker v. Baily, 540 P.2d 1398 (Or. 1975); Bricker v. Sceva Speare Memorial Hospital, 281 A.2d 589 (N.H. 1971); Blende v. Maricopa County Medical Society, 393 P.2d 926 (Ariz. 1964); Levin v. Sinai Hospital of Baltimore City, Inc., 46 A.2d 298 (Md. 1946).

[2] The progeny of Greisman v. Newcomb Hospital include Nanavati v. Burdette Tomlin Memorial Hosp., 526 A.2d 697 (N.J. 1987); Kelly v. St. Vincent Hospital, 692 P.2d 1350 (N.M. App. 1984); Storrs v. Lutheran Hospitals and Homes Society of America, Inc., 609 P.2d 24 (Alaska 1980); Hawkins v. Kinsie, 540 P.2d 345 (Colo. App. 1975); Silver v. Castle Memorial Hospital, 497 P.2d 564 (Haw. 1972); Davidson v. Youngstown Hospital Assn., 250 N.E.2d

have undertaken judicial review based upon the state's common law and fairness[3] or upon a specific provision of the California Code of Civil Procedure.[4] An Alaska court held that medical staff bylaws constitute a contract between the physician and the hospital and granted judicial review.[5]

Some states have denied any judicial review of medical staff decisions of private hospitals[6], but the West Virginia

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892 (Ohio App. 1969); Woodward v Porter Hospital, Inc., 217 A.2d 37 (Vt. 1966).

[3] Sywak v. O'Conner Hospital, 199 Cal. App.3d 423, 244 Cal. Rptr. 753 (1988); Miller v. National Medical Hospital of Monterey Park, Inc., 124 Cal. App.3d 81, 177 Cal. Rptr. 119 (1981); Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal.3d 541, 116 Cal.Rptr. 245, 526 P.2d 253 (1974).

[4] Anton v. San Antonio Community Hospital, 567 P.2d 1162 (Cal. 1977).

[5] McMillan v. Anchorage Community Hospital, 646 P.2d 857 (Alaska 1982)

[6] Sarin v. Samaritan Health Center, 440 N.W.2d 80 (Mich. App. 1989); Barrows v. Northwestern Memorial Hospital, 525 N.E.2d 50 (Ill. 1988); Medical Center Hospital v. Terzis, 367 S.E.2d 728 (Va. 1988); Hottentot v. Mid-Maine Medical Center, 549 A.2d 365 (Me. 1988); Brandt v. St. Vincent

state court rejected that line of cases when the termination of a preexisting physician-hospital relationship is involved.

This Court correctly observed that state courts typically limit their review of medical peer review decisions to be assured that a reasonable procedure was followed and that there was evidence to support a finding that patient care was at risk. Patrick v. Burget, 486 U.S. 94, 104-05, 108 S.Ct. 1658, 1665, 100 L.Ed.2d 83, 94 (1988). This unanimous Court was not at all concerned that Oregon law would likely limit judicial review to whether or not reasonable procedures had been followed and would not address the merits of the underlying peer review decision. Id. The

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Infirmary, 701 S.W.2d 103 (Ark. 1985); Velduis v. Central Michigan Community Hospitals, 369 N.W.2d 478 (Mich. 1985).

decision of the West Virginia court exceeds the anticipated scope of judicial review of the Oregon court forecast by this Court.

United Hospital Center is described by the state court as a

> private, not for profit hospital incorporated under the laws of the State of West Virginia. It was created voluntarily by private individuals. It is operated by an elected board of directors. It is not owned or operated by any governmental entity. (A-6).

UHC is a "pure" private hospital, without any contractual, financial or statutory ties whatsoever to a state or local governmental agency. State involvement without state responsibility cannot establish "a sufficiently close nexus between the State and the challenged action of the regulated entity that the action of the latter may fairly be treated as that of the state itself." Jackson v. Metropolitan Edison, 419 U.S. 345, 95 S.Ct. 449,42 L.Ed.2d 477 (1974). See also Flagg

Brothers, Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). If UHC is a "state actor" then every single hospital in the United States must comply with the due process clause of the Fourteenth Amendment when taking action adverse to a present or perspective member of its medical staff. Such a decision would be a radical and unnecessary change in the law, with ramifications beyond medical peer review decisions.

The dichotomy between private action and state action and the due process clause of the Fourteenth Amendment is well established in health care law. Relying on Jackson v. Metropolitan Edison, the Court of Appeals for the Fourth Circuit, which includes West Virginia, has held that the existence of state statutes governing myriad aspects of hospital operations, the receipt of Hill-Burton funds, and participation in the Medicare and Medicaid

programs, do not transmute a private hospital into a state actor. Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023 (4th Cir. 1982).

Other federal courts that have considered the question have held likewise. See Mendez v. Belton, 739 F.2d 15 (1st Circ. 1984); Lubin v. Crittenden Hospital Association, 713 F.2d 414 (8th Cir. 1983); Lipsett v. University of Puerto Rico, 637 F.Supp. 789 (D. Puerto Rico 1986) and Robbins v. Ong., 452 F.Supp. 110 (S.D.Ga. 1978); Shulman v. Washington Hospital Center, 222 F.Supp. 59 (D.D.C. 1963).

There is no conflict whatsoever among the state courts on this federal due process issue, and there is no reason for the Court to visit the issue. Mahmoodian's reliance upon Greisman v. Newcomb Hospital, 192 A.2d 817 (N.J. 1963), is misplaced. The New Jersey court did not declare Newcomb Hospital to be a state actor, and

judicial review was not undertaken on constitutional due process grounds. Judicial review was bottomed on the public interest in a community hospital's policy that appeared to keep a fully licensed and qualified osteopathic physician from seeking hospital privileges and competing with allopathic physicians that populated medical societies and hospital medical staffs in New Jersey. The decision was a narrow one. Only the validity of the medical staff's bylaws that conditioned hospital staff privileges on membership in the medical society was at issue. 192 A.2d at 824. A recent New Jersey decision treats of Greisman and the present standard of judicial review.

> In reaching that conclusion [i.e., in Greisman], we also declared that "reasonable and constructive exercises of judgment should be honored. . ." Id. Just last year, we further relaxed the test for judicial review and stated that courts should not interfere with a

> hospital decision setting a standard for admission "if it is reached in the normal and regular course of conducting the affairs of the hospital and is based on adequate information, regardless of form, origin, or authorship, that is generally considered feasible and reliable by professional persons responsibly involved in the health care field." Desai v. St. Barnabas Medical Center, [103 N.J. 79, 93, 510 A.2d 662 (1986)].

Nanavati v. Burdette Tomlin Memorial Hospital, 526 A.2d 697, 701 (N.J. 1987).

The judicial review standard applied by the West Virginia court here is like the judicial standard applied by a New Jersey court that sustained a private hospital's action against a disruptive physician. Courtney v. Shore Memorial Hospital, 584 A.2d 817 (N.J. Super. 1990). Relying on Nanavati v. Burdette Tomlin Memorial Hospital, supra, the New Jersey court said:

> When the decision relates to subjective matters such as disruptive conduct, a termination of hospital privileges requires a finding

> that prospective disharmony will probably have an adverse effect on patient care. . . . In all events, the courts are enjoined to recognize the expertise of the board and the extensive external regulation to which it is subjected.

Id. at 818.

It is not enough for Mahmoodian to cite to this Court cases where state courts "have shown a willingness to review actions of private hospitals on the ground that private hospitals are sufficiently involved with public interest to warrant judicial intervention." (p. 15). The West Virginia court did undertake judicial review of the decision of UHC. Yet, this is the best Mahmoodian can do. He is unable to direct this Court to any authoritative state or federal decision that would support application of the due process clause of the Fourteenth Amendment to the decision of the UHC board of directors to follow the recommendation of its medical staff and

revoke the medical staff privileges of Mahmoodian. See supra notes 1 to 6.

This case represents no more than the garden variety medical privilege/discipline issue now commonplace in this country as hospitals respond to federal and state legislation supporting medical peer review,[7] and to a high tide of medical malpractice suits carrying a corporate negligence count against a hospital for failure to police its medical staff privileges.

2.

The Court need not intervene here in reply to Mahmoodian's public policy plea because the Congress of the United States

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[7] By 1985, forty-five (45) states had adopted legislation establishing some form of qualified privilege to protect medical peer review work from disclosure in order to encourage effective medical peer review. Daily Gazette Co. v. West Virginia Board of Medicine, 352 S.E.2d 66 (W.Va. 1986). By 1986, Congress enacted the Federal Health Care Quality Improvement Act (42 U.S.C. §§ 11101-11152) to encourage good faith medical peer review to identify incompetent or unprofessional practitioners.

has acted to introduce uniform hearing procedures and standards into medical peer review matters in both private and public hospitals. The Federal Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101-11152, was enacted to deter litigation arising out of the grant or denial of hospital medical staff privileges. Congress expressly found that "[t]here is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." 42 U.S.C. 11101(5).

The Act creates a National Data Bank to record medical malpractice judgments and settlements as well as adverse peer review decisions. Hospitals and their medical staff members that request Data Bank records on physicians holding or seeking medical staff privileges and that meet certain procedures and standards for peer

review action are qualifiedly immune from suit for money damages under state or federal law. 42 U.S.C. 11111(a). The specific standards and procedures for peer review action are reprinted in the appendix ("F") to this brief in opposition. The Act is not intended to change any federal or state law concerning the judicial standard of review of peer review activities [42 U.S.C. 11115(a)], but the Act will produce uniform peer review procedures among public and private hospitals to secure the qualified immunity.

3.

Whether Mahmoodian had adequate opportunity to cross-examine witnesses was fully briefed and argued on appeal and addressed by the state court, which held:

> The procedure in question was reasonable for peer review. . . . The procedure here certainly complied with the medical staff bylaws, which authorized an evidentiary hearing without strict adherence to evidentiary

> rules applicable to civil or criminal trials in courts of law. . . . Also, each of the procedural rights afforded Dr. Mahmoodian would satisfy the hearing standards established by the Federal Health Care Quality Improvement Act of 1986. . . . (Citations and footnotes omitted). (A-26 to 27).

The trial court, after a three-day evidentiary hearing on Mahmoodian's motion for a preliminary injunction, made a like factual finding (Appendix C, Finding No. 3) and concluded that "The actions of UHC were in accord with the procedures provided under the Bylaws of the Medical Staff and were not exercised in an arbitrary and capricious manner." (Appendix C, Conclusion No. 3).

Whether or not Mahmoodian was denied an adequate opportunity to cross-examine witnesses is not a transcendent issue to call forth this Court's discretionary review. A writ of certiorari is not for the purpose of second guessing the

considered judgment of the highest court of a state on such a case-specific issue. Review of this issue would have no effect whatsoever on the larger body of law that applies to medical peer review.

Below as here, Mahmoodian challenged the motive of the medical staff for acting against him. The state court, which adopted a "substantial evidence" standard over a less invasive/inquiring "arbitrary and capricious (or abuse of discretion)" standard (A-45), found in the record "substantial evidence supporting (the hospital's) decision." (A-50). The state court specifically referred to three "of the more egregious incidents" (the court's own words) supporting the decision; the state court also noted "The record is replete with other evidence supporting the hospital's decision to revoke Dr. Mahmoodian's staff appointment privileges." (A-46 to 50).

Mahmoodian's assertion that UHC's medical staff bylaws failed to provide a sufficiently definite standard to which he might conform his conduct is without factual or legal merit. UHC's medical staff bylaws require that members of the medical staff "adhere to the ethics of their profession" and demonstrate "an ability to work with others" so that "any patient treated (by the physician in question) will be given a high quality of medical care." (Medical Staff Bylaws 3.02). Corrective action against a member of the medical staff is undertaken "whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be . . . disruptive to the operations of the hospital." (Medical Staff Bylaws 7.01). The American College of Obstetricians and Gynecologists (ACOG), of which Mahmoodian is a fellow, charges its members with

adherence "to the social and ethical principles of honesty, loyalty, courtesy, and respect for the rights of others - above all honesty. . . . No Fellow should use opportunities arising out of contact with patients, colleagues, or the general public for self-aggrandizement or for demeaning the reputation of a colleague." Ethical Considerations in the Practice of Obstetrics and Gynecology (7th ed.).

Mahmoodian was no stranger to the conduct requirements of the medical staff bylaws, which were fleshed out for him in repeated corrective actions in the 1970's, including a one-year reduction in 1977 from active medical staff to provisional medical status for conduct like the conduct that again subjected him to medical staff scrutiny in 1987 and 1988.

The standard of "unprofessional conduct" in medical staff bylaws is sufficiently objective to guard against

arbitrary and unreasonable application. Nanavati v. Burdette Tomlin Memorial Hospital, supra. Application of an "unprofessional conduct" standard encompasses disruptive personal and professional relationships with other hospital personnel. Even v. Longmont Hospital Association, 629 P.2d 1100 (Colo. 1981). In accord, McMillan v. Anchorage Community Hospital, 646 P.2d 857 (Alaska 1982). It is for a hospital to decide whether personality differences are detrimental to the efficient operation of the hospital. Robbins v. Ong, 452 F.Supp. 110 (S.D.Ga. 1978). A failure of good moral character may also subject a physician to censure; good medical care alone is not sufficient to justify licensure and the highest degree of personal integrity may be expected. Alsabti v. Board of Registration of Medicine, 536 N.E.2d 357 (Mass. 1989). See

also Hirsh, The "Disruptive" or "Bad" Physician in the Hospital, 35 Medical Trial Technique Quarterly 304, Calaghan & Co. 1989; Springer and Casale, Hospitals and the Disruptive Health Care Practitioner - Is the Inability to Work with Others Enough to Warrant Exclusion?, 24 Duquesne Law Review 377, 383-384 (1985).

The state court concluded:

> Accordingly, we believe sections 7.01 and 3.02 of the medical staff bylaws in this case set forth a reasonably definite standard of professional conduct for purposes of basic notice to medical staff members as to what behavior is and is not expected of them. Moreover, in this particular case, given Dr. Mahmoodian's history as far back as 1974 of seven other "corrective actions" by the medical staff for similarly disruptive behavior, his assertion that he did not know what constituted such behavior is implausible. (A-31 and 32).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the

West Virginia Supreme Court of Appeals should be denied.

Respectfully submitted this 16th day of August, 1991.

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APPENDIX*

C. Order, findings of fact, and conclusions of law of the trial court on Mahmoodian's motion for a preliminary injunction, entered February 1, 1989

D. Chronology and description of events before United Hospital Center and its medical staff concerning the privileges of Dr. Mahmoodian

E. Report and Recommendation of the Hearing Committee

F. Health Care Quality Improvement Act, Standards for Professional Review Actions

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* Respondents begin lettering this appendix with "C" to take account of petitioner's appendix, which contains items "A" and "B".

IN THE CIRCUIT COURT
OF HARRISON COUNTY, WEST VIRGINIA

SAEED MAHMOODIAN, M.D.,

Plaintiff,

v. // Civil Action No.. 89-C-25-1

UNITED HOSPITAL CENTER, INC.,
BRUCE C. CARTER, ALI RAHIMIAN,, M.D.
and FLORENCIA C. LOPEZ, M.D.

Defendants.

O R D E R

On the 27th day of January, 1989, came the plaintiff, Saeed Mahmoodian, M.D. by his attorney, Jerald E. Jones, and came the defendants United Hospital Center, Inc. ("UHC") and Bruce C. Carter by two of their attorneys, Herbert G. Underwood and Gordon H. Copland, pursuant to the request of the plaintiff for injunctive relief.

Now pending before the Court is the motion of the plaintiff for a preliminary

injunction whereby the plaintiff seeks an injunction requiring the defendant, United Hospital Center, Inc., to continue the plaintiff's active staff privileges during the pendency of this civil action.

The original complaint sought a complete restoration of plaintiff's privileges as a medical staff appointee at UHC, including the restoration of the privilege to do Wertheim ("radical") hysterectomies. The plaintiff now seeks only a return of all such privileges other than the privilege to perform Wertheim ("radical") hysterectomies.

In addition to preliminary and permanent equitable relief, the plaintiff, by his verified complaint, seeks compensatory and punitive damages from UHC and the other defendants.

The Court has heard three days of testimony and now has before it the

exhibits introduced at the hearing and filed by the parties with their pleadings, motions, and briefs. Upon consideration of the testimony, the entire record, and the arguments and briefs of counsel the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. UHC is a private not-for-profit hospital under the laws of the state of West Virginia which is operated by an elected Board of Directors and is not owned or operated by any governmental entity and is the only hospital in Harrison County, West Virginia, which provides all phases of hospital care for the general public and the only hospital in said county available for the hospitalization and treatment of obstetrical and gynecological patients.

2. The plaintiff, Saeed Mahmoodian, is a physician, licensed to practice

medicine in the State of West Virginia; he is board certified in obstetrics and gynecology; he has been afforded staff privileges in obstetrics and gynecology at United Hospital Center, Inc. or its predecessor corporation, for approximately eighteen years; he is not licensed to practice medicine in any state other than West Virginia; he does not have staff privileges at any hospital other than United Hospital Center, Inc. and from that time his practice at UHC has been subject to the Bylaws of the Medical Staff.

3. On or about February 8, 1988, UHC began against the plaintiff the "corrective action" process, at issue here, as provided for in the UHC Medical Staff Bylaws. Dr. Mahmoodian was notified of the formation of an investigative committee and at all subsequent stages of the process was informed of the procedures and the nature

and extent of his right to participate. Dr. Mahmoodian was represented by counsel during the process. By counsel, Dr. Mahmoodian objected at various points to the procedures. The Court finds, however, that the procedural provisions of the Bylaws were substantially followed, including the Ad Hoc Review Committee allowing the members of the Ad Hoc Investigative Committee to submit hearsay testimony and to summarize evidence obtained by that committee. The adequacy of the Bylaws provisions is addressed in the Conclusions of Law.

4. The members of the Medical Staff Ad Hoc Investigative Committee, none of whom were competitors of the plaintiff, recommended termination of the plaintiff's privileges. The Executive Committee of the Medical Staff adopted the recommendation. The plaintiff exercised his right, by

counsel, according to the Medical Staff Bylaws, to a hearing before an Ad Hoc Review Committee appointed to review the charges and hear the evidence. The members of the Ad Hoc Review Committee were not competitors of the plaintiff and had not participated in the investigative process. The Ad Hoc Review Committee convened on May 4, 1988 and continued its hearing on three additional occasions. During the hearing, over the objection of plaintiff, there were occasions that the Committee received hearsay and opinion evidence in support of the recommendation of the Medical Executive Committee. Plaintiff also submitted hearsay evidence to rebut the recommendation of the Medical Executive Committee. At the conclusion of its deliberations, the Ad Hoc Review Committee issued a written decision which upheld the recommendation to terminate the plaintiff's

privileges. Subsequently, at a special meeting of the Medical Staff on October 18, 1988, by a vote of 32-17, the Medical Staff voted to recommend termination of the plaintiff's medical staff privileges. Thereafter, the plaintiff exercised his right, by counsel, to an appellate review before the UHC Board of Directors. Together with his attorney, he met with the Appellate Review Committee, on December 8, 1988. On December 27, 1988, the Appellate Review Committee of the Board of Directors voted to terminate the plaintiff's staff privileges effective January 31, 1989. Pursuant to the Medical Staff Bylaws, plaintiff was notified of the decision by defendant Carter on December 28, 1988.

5. The basis for the termination was that the plaintiff had engaged in a pattern of behavior which was unprofessional, disruptive of the proper functioning of the

obstetrical/gynecological ("OB/GYN") unit of the hospital and violative of the standards set forth in the Medical Staff Bylaws. For reasons set forth in the Conclusions of Law, the Court is not empowered to make a de novo determination of these issues.

6. The Bylaws of the Medical Staff at UHC do not condition "corrective action" for physicians holding staff privileges on patient harm or the likelihood of patient harm and there was no evidence that the plaintiff was not qualified to practice obstetrics and gynecology, or that his presence on the staff had actually harmed a specific patient.

7. UHC receives payments for patient care from various governmental sources, including the Medicare and Medicaid programs. The plaintiff has not shown any nexus between the decision of UHC to

terminate the privileges of the plaintiff and those payments or any branch of government.

8. The termination of plaintiff's staff privileges at United Hospital Center, Inc. substantially affects and curtails his ability to practice obstetrics and gynecology as hospital privileges are of paramount importance in that medical specialty and his inability to use United Hospital Center facilities will have a significant impact upon his practice and upon his income. The plaintiff has not applied for staff privileges at other hospitals in the locality surrounding Harrison County and did not demonstrate that he is unable to obtain clinical privileges at those hospitals. Nor did he refute that there are physicians available on the Medical Staff of UHC to provide

OB/GYN services to the class of patients served by the plaintiff.

9. The plaintiff, in addition to his private practice, is the only physician who presently attends indigent female patients at the Harrison County Health Department Pre-Natal Clinic and Family Planning Clinic. The patients of the Pre-Natal Clinic consist of thirty to forty pregnant females who will need hospital facilities for child birth.

10. Certain of the current obstetrical patients of the plaintiff present special risks in regard to their delivery or their health generally. Precluding care of them by Dr. Mahmoodian and requiring their transfer to other physicians would not serve their best interests or provide the safest mode of treatment. The latter conclusion also is applicable to any GYN patients of the

plaintiff as of January 31, 1989, who may require gynecological surgery in the near future.

11. In conformity with the provisions of the Bylaws which provide for such, except in cases of summary suspension, the plaintiff has continued to practice at United Hospital Center during the course of the disciplinary proceedings against him.

Conclusions of Law

1. The Court concludes that in ruling on a preliminary injunction request, it must balance the equities of the case and, in doing so, must consider the following:

(1) The probability of irreparable harm to the plaintiff if the injunction is denied;

(2) The probability of harm to the defendant if the injunction is granted;

(3) The likelihood of success on the merits;

(4) The public interest.

2. The burden is on the plaintiff to establish his entitlement to a preliminary injunction.

3. The restrictions of the Constitutions of the United States and West Virginia apply only with respect to governmental action. The action of an otherwise private entity can become "state action" for the purposes of the constitutional restrictions only if there is a sufficient nexus between the challenged act and the government.

4. There is no sufficient nexus between the termination of the privileges of the plaintiff and a governmental entity to require this Court to conclude that the hospital's actions constitute state action; therefore, the action terminating the

plaintiff's privileges was not governed by the restrictions of the Constitutions of West Virginia or of the United States.

5. The only procedural protections to which the plaintiff was entitled were those found in the Bylaws of the UHC Medical Staff.

6. The actions of UHC were in accord with the procedures provided under the Bylaws of the Medical Staff and were not exercised in an arbitrary and capricious manner.

7. Although the Court finds that UHC is a private hospital, it nevertheless concludes that UHC is required to comply with its own Bylaws and the due process provisions contained therein, in terminating the privileges of a staff appointee.

8. The Court further concludes that a court may not substitute its judgment for

that of the medical staff and the Board of Directors of a private hospital in matters regarding medical staff privileges. The Court, however, holds that it may overturn such a decision if the decision is arbitrary and capricious.

9. The plaintiff has not shown that denial of the request for a preliminary injunction will cause him irreparable harm.

10. The plaintiff has not shown any likelihood of success on the merits of his claim for injunctive relief against UHC; furthermore, the Court holds that the plaintiff's claim against UHC as presented in this hearing will probably fail on the merits for injunctive relief. There is no indication that the plaintiff can prevail on his claim for permanent injunctive relief against UHC because UHC is not a public hospital; nor is it likely that the plaintiff can show that the termination

decision of the hospital was arbitrary and capricious.

11. The public interest in the overall quality of patient care at UHC and the efficient operation of the hospital must be balanced with the interest of specific patients of Dr. Mahmoodian in continuity of care. This latter interest may be served by the granting of a temporary and limited injunction.

Order

In weighing all of the foregoing, the Court does hereby ORDER that the plaintiff's Motion is DENIED conditioned upon the requirement that the defendant shall grant temporary and limited privileges to the plaintiff for a period of 90 days from January 31, 1989 or until such time as all of the patients as of January 31, 1989 of the plaintiff presently in their third trimester of pregnancy are

delivered. The privileges shall be limited in scope and extent as described below:

1. The scope of clinical practice allowed under the temporary privileges shall be that possessed by the plaintiff prior to the initiation of corrective action by UHC; provided, however, that the hospital is not required to grant privileges to the plaintiff to perform Wertheim (radical) hysterectomies; and,

2. The privileges shall apply to persons who are OB/GYN patients of the plaintiff as of January 31, 1989 who also meet the following conditions:

   a. OB patients in the third trimester of their pregnancy; or,

   b. GYN patients who are in need of surgical treatment.

The plaintiff is to provide within the next ten (10) days a list of his obstetrical patients who, as of January 31, 1989, are in their third trimester of pregnancy.

The parties hereto object and except to the extent their respective interests are affected thereby.

By agreement of the parties, the injunction bond required by W.Va. Code §53-5-9 is hereby waived for the duration of this Order.

The Clerk is directed to send a certified copy of this Order to counsel of record.

ENTER: _____

_____
Judge

Chronology and Description of Events Before UHC and Its Medical Staff

A. Medical Staff Executive Committee-Ad Hoc Investigative Committee

Feb. 8, 1988 -

The Executive Committee of the Medical Staff received a request for corrective action from Bruce Carter, Administrator of United Hospital Center, Inc., regarding plaintiff's care and treatment of patients, particularly Geneva Boram, and complaints that plaintiff had engaged in unprofessional conduct and a practice of harassment of employees and physicians at United Hospital Center.

Feb. 11, 1988 -

Dr. Bryant, President of the Medical Staff, notified Plaintiff that, in accordance with the Bylaws of the Medical Staff of United Hospital Center, he had appointed an ad hoc investigative committee to review the request for corrective action and that plaintiff would be contacted in order to confirm a time on February 12, 1988 for his interview with the committee.

Feb. 12, 1988 -

By letter from counsel, plaintiff notified the chairman of the ad hoc investigatory committee that he

would not participate in the committee's proceedings.

Feb. 16, 1988 -

By counsel, the Committee advised plaintiff in writing that such interviews by the medical staff are not accusatory and have permitted physicians involved in such investigations to discuss complaints prior to any definitive action being taken, but that if plaintiff declined to discuss the matters raised in the complaints with the Committee, it would submit its recommendation to the Executive Committee of the Medical Staff without the benefit of his input. The letter also noted that Dr. Mahmoodian had participated in a similar investigative interview the previous year during an earlier peer review proceeding.

Feb. 23, 1988 -

By counsel, plaintiff reiterated his position that he should not "be hauled in before a Committee."

Mar. 1, 1988 -

Counsel for the medical staff committee again advised plaintiff's counsel that the request for an intraprofessional investigative interview was not accusatory but was for the purpose of extending to the plaintiff the opportunity to appear at the Committee's meeting.

Mar. 3, 1988 -

Dr. Mahmoodian, with his attorney, met with the investigative committee, which also had an attorney present, to explore the medical staff's concerns.

Mar. 18, 1988 -

The ad hoc investigative committee, after 22 hours of interviews and deliberations over the course of several meetings, filed a written report of its findings and recommendations with the Medical Executive Committee.

B. Medical Staff Executive Committee-Ad Hoc Review Committee

Mar. 22, 1988 -

Plaintiff was notified that, in accordance with the Bylaws of the Medical Staff of United Hospital Center, the Executive Committee, at its regular monthly meeting on Monday, March 21, 1988, had reviewed the recommendation of the ad hoc investigative committee and had voted to recommend the ad hoc committee's recommendation to the Board of Directors. Pursuant to Article VIII of the Medical Staff Bylaws, plaintiff was further notified of his right to a hearing before an ad hoc hearing (review) committee of the medical staff

before any recommendation was forwarded to the Board.

Mar. 30, 1988 -

Plaintiff requested a hearing and the right to be represented by an attorney at the hearing.

Apr. 7, 1988 -

After agreement among the parties regarding scheduling, plaintiff was notified that the requested hearing was scheduled for Wednesday, May 4, 1988 and of the procedure to be there followed in accordance with Article VIII of the Medical Staff Bylaws.

May 4, 1988 -

The ad hoc hearing committee of the Medical Staff convened with Charles Johnson, a local attorney at law, presiding as hearing examiner. The committee members were William Walker, M.D., Seetha Ginjupalli, M.D. and Paul Braeger, M.D. None of these physicians was associated with or in competition with plaintiff and none had any previous knowledge of the complaint under review.

May-Aug, 1988 -

The ad hoc hearing committee met on five occasions to determine if the recommendation of the Medical Executive Committee was fair and reasonable. Plaintiff appeared in

person and by counsel and participated fully in the hearing.

At the conclusion of the hearing, by agreement of all the parties, written memoranda were submitted by the Executive Committee and Dr. Mahmoodian.

Sept.14, 1988 -

Plaintiff was sent the written Report and Recommendation of the Hearing Committee and notified of his right to request an appellate review by the Governing Board in the event that the Executive Committee made an adverse recommendation.

Thereafter, before any appellate review occurred, the suggested procedure was corrected and plaintiff was notified of his right to a full hearing before the full medical staff prior to submission of any recommendation of the Medical Executive Committee to the Board of Directors, all as provided by the applicable Medical Staff Bylaws.

C. Special Medical Staff Meeting

Oct. 18, 1988 -

Pursuant to notice given on October 4, 1988, a special meeting of the full medical staff was held to review the action of the Ad Hoc Review Committee. At that meeting, plaintiff provided both a written and oral presentation of his case.

By a vote of 32-17, the medical staff voted to recommend termination of his medical staff privileges. By a vote of 40-6, it also voted to suspend his privileges to perform Wertheim (radical) hysterectomies. No competitor of the plaintiff voted on the issues.

D. Board of Directors, Appellate Review Committee

Dec. 8, 1988 -

Plaintiff, accompanied by counsel, met with the appellate review committee of the Board of Directors. Prior to that plaintiff and his counsel had reviewed the membership of that committee and objected to several individuals, who were then removed from the Committee's deliberations.

Dec. 28, 1988 -

Plaintiff was notified of the action and decision of the appellate review committee of the Board of Directors.

UNITED HOSPITAL CENTER, INC.

In the matter of:
Saeed Mahmoodian, M.D.

REPORT AND RECOMMENDATION
OF HEARING COMMITTEE

On February 8, 1988, the Executive Committee of the Medical Staff of United Hospital Center appointed an Ad Hoc Committee to investigate various matters pertaining to the staff privileges of Saeed Mahmoodian. By letter dated February 1, 1988, Dr. Mahmoodian was notified that a committee consisting of Doctors Franklin Oliverio, Samuel Guy, Charles Lefebure and James Bland had been appointed.

The Ad Hoc Committee of the Medical Staff met four times and conducted interviews with physicians, hospital employees and former patients and reviewed documentation and hospital records concerning Dr. Mahmoodian. At the

conclusion of those hearings, the Committee unanimously recommended that the privileges of Dr. Mahmoodian to perform Wertheim hysterectomies with pelvic lymphadenectomies be suspended pending further review through the Credentials Committee, and that the staff privileges of Dr. Mahmoodian at United Hospital Center be terminated because his behavior endangered the quality of patient care and the existence of the obstetrics/gynecological service at United Hospital Center.

The Executive Committee adopted the recommendations of its Ad Hoc Committee, and pursuant to the bylaws of the Medical Staff, Dr. Mahmoodian was notified of this decision, which decision was adverse to him, and he exercised his right to have a hearing before a Committee appointed by the Medical Staff. The President of the Medical Staff appointed a Committee

consisting of Doctors William N. Walker, Seetha Ginjupalli and Paul Brager, and by agreement of all the parties, the Executive Committee and Dr. Mahmoodian were permitted to be represented by counsel at any hearing before such Committee.

The Hearing Committee convened its hearing on May 4, 1988, and continued this hearing on four additional occasions. At the conclusion of the hearing, by agreement of all the parties, memoranda were submitted by the Executive Committee and Dr. Mahmoodian.

The Committee agrees with the recommendation of the Investigative Committee concerning performance of Wertheim hysterectomies with pelvic lymphadenectomies. Based on the evidence before the Committee, there has been a substantial question raised not only about the method by which this procedure

presently is being performed at UHC but also about whether such surgery should be performed at this community hospital. The Executive Committee presented evidence supporting its recommendation, and Dr. Mahmoodian failed to demonstrate that such recommendation involved no factual basis, or that the basis was arbitrary, unreasonable or capricious.

Regarding the recommendation that the staff privileges of Dr. Mahmoodian be terminated, the bylaws of United Hospital Center, particularly Article VII, Section 7.01 provide that if the activities or professional conduct of any practitioner are considered lower than the standards or aims of the Medical Staff, or to be disruptive of the operations of the Hospital, corrective action may be taken. In the matter now before the Committee, the corrective action which was recommended by

the Investigative Committee was termination of the staff privileges of Dr. Mahmoodian.

The evidence presented to this Committee by the Investigative Committee demonstrated that the conduct of Dr. Mahmoodian fell within that conduct described in the above section. The Committee finds that there is an ongoing dispute between Doctors Mahmoodian and Rahimian and Dr. Mahmoodian and the nurses in the obstetrical department. The weight of the evidence supports the conclusion that Dr. Mahmoodian has instigated the turmoil and hostility which exists in that department.

A member of the Investigative Committee testified that there is a general fear of Dr. Mahmoodian among the medical and nursing staff of the Hospital's obstetrical department. Dr. Mahmoodian acknowledged that he considers at least two

of his fellow physicians as enemies and does not speak to several of the nurses with whom he has had disagreements.

Concerning the issue of whether any specific harm to patients has actually occurred, one of the members of the Investigative Committee testified that although he was not aware of any specific harm to patients as a result of the behavior of Dr. Mahmoodian, he felt that the potential existed that such behavior would adversely affect patient care.

In one instance, being that of Noreen Pursley, the transcript of her testimony before the Investigative Committee did indicate that patient care was being compromised as a result of the feud between Dr. Mahmoodian and Dr. Rahimian. In addition, the attempted interruption of a surgery by Dr. Mahmoodian as described by one nurse could potentially have resulted

in adverse consequences for the patient. Testimony concerning Virginia Edgell likewise demonstrated that patient care could have been compromised. The Committee believes that these examples, together with others in the record, as well as the evidence of open hostility between Dr. Mahmoodian and the physicians and nurses in the obstetrical department, discussed above, support the conclusion that it is likely that patient care will be affected if appropriate correction action is not taken.

The witnesses also presented, and the Committee reviewed, evidence concerning past behavior on the part of Dr. Mahmoodian for the purpose of determining whether a pattern of disruptive behavior or unprofessional conduct existed which was unlikely to change through corrective action. Dr. Mahmoodian had been

reprimanded on one occasion, and his privileges curtailed on a second occasion by the Medical Executive Committee and the Board of Directors for conduct similar to the conduct currently under review. There is no reasonable likelihood that Dr. Mahmoodian will change his behavior and work to achieve the level of professional cooperation and collegiality necessary to assure quality patient care in the obstetrical department of the Hospital.

The adverse decision of the Executive Committee concerning the issue of the privileges of Saeed Mahmoodian, M.D. was supported by appropriate evidence. The rebuttal presented by Dr. Mahmoodian failed to show that the decision of the Executive Committee lacked any factual basis or that such decision was arbitrary, unreasonable or capricious. The Committee reviewed and considered the testimony of Dr. Mahmoodian

himself, and all documents submitted with his testimony including affidavits of patients regarding his care and treatment of them.

According to the bylaws of the Medical Staff, this Committee may recommend confirmation, modification or rejection of the original decision of the Executive Committee. Based on all the evidence adduced, and the submissions of counsel, the Committee unanimously recommends to the Executive Committee that its original decision on which these hearings were conducted concerning Saeed Mahmoodian, M.D., be confirmed in its entirety with a modification pertaining to Wertheim procedures, that the review by the Credentials Committee be concluded on or before January 1, 1989, but if such review is not completed by that time, then it is the recommendation of this Committee that

the portion of the original decision of the Executive Committee suspending Dr. Mahmoodian's privileges to perform Wertheim hysterectomies with pelvic lymphadenectomies be rejected, and his privileges in that area restored.

Respectfully submitted,

_____
William N. Walker, M.D.
Chairman

_____
Seetha Ginjupalli, M.D.

_____
Paul Brager, M.D.

Health Care Quality Improvement Act, Standards for Professional Review Actions

§11112 Standards for professional review actions

(a) In general -

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating-

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating--

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is required on a timely basis under paragraph (1)(B)--

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)-

(i) before an artbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right--

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof.

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of

law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved had the right-

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3) of this section.

91-738

Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1991, Term

SAEED MAHMOODIAN, M.D., Petitioner,

vs.

UNITED HOSPITAL CENTER, INC. AND
BRUCE C. CARTER, Respondents.

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court of Appeals
of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a hospital in deciding to terminate or restrict the staff privileges of one of its physicians must comply with the procedural and substantive due process rights guaranteed by the Fourteenth Amendment of the United States Constitution.

B. Whether failure of a hospital to provide a sufficiently definite standard for proscribed conduct which may be the basis for revocation of staff privileges of one of its physicians constitutes a denial of due process.

C. Whether failure to grant a physician whose staff privileges may be revoked the right to cross-examine his accusers and witnesses against him constitutes a denial of due process.

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OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is not yet reported in the Southeastern Reporter. A copy is attached as Appendix A of Appendix.

The opinion of the Circuit Court of Harrison County, West Virginia, is unpublished. A copy is attached as Appendix B of Appendix.

JURISDICTION

This petition for writ of certiorari is taken from a decision rendered on April 25, 1991, by the Supreme Court of Appeals of West Virginia, a court of last resort, in the case styled Saeed Mahmoodian, M.D. v. United Hospital Center, Inc. and Bruce C. Carter, Case No. 19504 (W. Va. April 25, 1991). This court has jurisdiction pursuant to the provisions of 28 U.S.C.S. §1257(3) (Law. Co-op. 1977).

CONSTITUTIONAL PROVISIONS INVOLVED

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV, §1.

STATEMENT OF THE CASE

Saeed Mahmoodian, M.D. (Mahmoodian) is one of only three board certified physicians specializing in obstetrics and gynecology at United Hospital Center, Inc. (UHC), Clarksburg, West Virginia.

Mahmoodian has been in private practice in his specialty in Harrison County for over twenty years. He is a prolific author of medical articles, has lectured abroad, and holds a patent on a medical instrument invented by him.

UHC is the only public hospital located in Harrison County, West Virginia, (population approximately 70,000), and is the only medical facility available within a 25-mile radius for treatment of female patients requiring obstetrical and gynecological services.

Since the filing of the complaint against Mahmoodian in February, 1988, he has continued to work and treat patients at UHC, without complaint.

On February 11, 1988, Mahmoodian received a letter from the President of the UHC medical staff, stating that an Investigative Committee of the UHC medical staff was investigating his care and treatment of his patient by the name of Geneva Boram and was further investigating unnamed and undesignated allegations and that the committee further would investigate whether Mahmoodian had

instigated law suits against UHC and physicians on its medical staff.

Mahmoodian appeared before the Investigative Committee, as requested; even though the notice did not properly advise him of the matters or misconduct to be addressed.

At the meeting with the Investigative Committee, Mahmoodian was confronted with and questioned about a medical malpractice suit pending in the Circuit Court of Harrison County, West Virginia, in which one of his patients had sued UHC and others and in which UHC had joined Mahmoodian as a third-party defendant. At the Investigative Committee meeting, counsel for UHC in the medical negligence suit was present and acted as counsel for the Investigative Committee. The Investigative Committee recommended that Mahmoodian's staff privileges at UHC be terminated.

An Ad Hoc Hearing Committee was established by UHC to consider the recommendation of the Investigative Committee to terminate Mahmoodian's staff privileges.

At the hearing conducted by the Ad Hoc Committee, the evidence presented by UHC, over Mahmoodian's objection, consisted of members of the Investigative Committee who testified as to what other persons had told them and expressed their opinions as to the credibility of the witnesses who they interviewed.

Mahmoodian was denied the right to confront and cross-examine the actual witnesses who the Investigative Committee interviewed during the course of its investigation, contrary to the bylaws of UHC and contrary to the accepted and recognized due process rights under the laws of the United States and the State of

West Virginia.

The Ad Hoc Hearing Committee recommended that the report of the Investigative Committee be upheld and that Mahmoodian's staff privileges at UHC be terminated. This decision was upheld by the UHC governing bodies, effective January 31, 1989.

The essential grounds cited by UHC for termination of Mahmoodian's staff privileges are personality conflicts with others and the fear of other physicians and nurses that he incites patients to file medical negligence actions. There are no accusations that Mahmoodian is an incompetent physician or that any patient has suffered any adverse consequences at UHC, or otherwise, as a result of his treatment.

Mahmoodian, after having exhausted his administrative remedies, filed suit in the

Circuit Court of Harrison County alleging (1) that the UHC bylaws do not provide adequate due process for terminating physicians' staff privileges; (2) misuse of the disciplinary proceeding by UHC to intimidate and harass Mahmoodian and to prevent him from testifying in medical negligence cases; (3) misuse of the hospital disciplinary proceedings to thwart competition by other obstetricians/ gynecologists; and (4) a desire on the part of the hospital administrator to replace foreign medical graduates with American doctors.

A hearing was held before the Circuit Court upon Mahmoodian's prayer for a preliminary injunction to retain staff privileges during the pendency of the civil action. At this hearing Mahmoodian produced evidence from private patients and the County Health Department's free family

planning and pre-natal clinic demonstrating a substantial hardship upon them to change physicians and/or hospitals and that the free clinic would have to close down that service if Mahmoodian's staff privileges at UHC are terminated.

UHC admitted that Mahmoodian's staff privileges were not terminated because of his clinical skills as a physician or that they had any evidence of specific harm to any patient at UHC because of Mahmoodian's so called disruptive conduct. The position of the hospital was essentially that UHC is a "private hospital" as opposed to a "public hospital"; that Mahmoodian has no recourse in the courts because courts cannot look behind the hospital bylaws to determine if due process was provided; that the hospital has a right to terminate a physician's staff privileges on the basis of personality conflicts if the physician's

behavior "may" create a potential for patient harm (emphasis mine); and that Mahmoodian, in this case, has been provided with a fair due process hearing.

The Circuit Court, in its initial order denying a preliminary injunction, held that:

> (a) UHC is the only hospital in Harrison County available for the hospitalization and treatment of obstetrical and gynecological patients.
>
> (b) The termination of Mahmoodian's staff privileges at UHC substantially affects and curtails his ability to practice obstetrics and gynecology as hospital privileges are of paramount importance in that medical specialty and his inability to use UHC facilities will have a significant impact upon his practice and his income.
>
> (c) Mahmoodian is the only physician in Harrison County presently attending indigent female patients at the Harrison County Health Department Pre-Natal Clinic and Family Planning Clinic which consists of thirty to forty pregnant females who will need hospital facilities for child

birth.

(d) Certain of the obstetrical and gynecological patients of Mahmoodian present special risks in regard to their delivery and health generally.

(e) Mahmoodian has continued to practice at UHC during the course of the disciplinary proceeding.

(f) UHC is a private, non-profit hospital, not operated by any governmental agency.

(g) The actions of a private entity can become state action for the purpose of the constitutional restrictions only if there is a sufficient nexus between the challenged act and the government.

(h) The only procedural protection to which Mahmoodian was entitled were those found in the bylaws of UHC.

(i) UHC, as a private hospital, is only required to comply with its own bylaws and the due process provisions contained therein in terminating staff privileges.

(j) The court may not substitute its judgment for that of the medical staff and the Board of Directors, except where such decision was arbitrary and capricious.

Mahmoodian then petitioned the Supreme Court of Appeals of West Virginia for a preliminary injunction, which was granted on April 18, 1989.

UHC thereafter moved the Circuit Court of Harrison County, West Virginia, to dissolve the preliminary injunction issued by the Supreme Court of Appeals of West Virginia. That motion was denied, and a permanent injunction was ultimately issued by the Circuit Court of Harrison County abrogating the decision of UHC to terminate the staff privileges of Mahmoodian.

UHC then sought dissolution of the permanent injunction granted by the Circuit Court of Harrison County.

The federal questions of whether a hospital must afford due process to a physician whose staff privileges are subject to revocation and what minimum process must be afforded were raised before

the Circuit Court and the Supreme Court of Appeals of West Virginia.

The Supreme Court of Appeals of West Virginia held that the medical staffing decisions of private hospitals are subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws as well as to ensure that the medical staff bylaws afford "fair hearing procedures", not due process. The court further held that the introduction of hearsay evidence before the Ad Hoc Hearing Committee and the inability of Mahmoodian to cross-examine adverse witnesses at that stage of the proceeding was reasonable for peer review procedure; that the conduct proscribed by the bylaws upon which the revocation is based was not impermissibly vague; and that "disruptive conduct" is an appropriate ground for revocation of hospital staff privileges.

REASONS FOR GRANTING WRIT

UNITED HOSPITAL CENTER, INC. IS A STATE ACTOR, AND IN ACTIONS TO TERMINATE OR RESTRICT STAFF PRIVILEGES OF ONE OF ITS PHYSICIANS IT MUST AFFORD THE PHYSICIAN THE CONSTITUTIONAL SAFEGUARDS OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

We urge this court to abandon the private hospital-public hospital dichotomy and apply the due process protections of the Fourteenth Amendment to actions of all hospitals in terminating, revoking or refusing medical staff privileges to a physician. A public hospital is required to meet the provisions of the Fourteenth Amendment when acting on staff privileges of a physician. We submit that case law and sound public policy demand such protection in all hospital decisions affecting physician privileges.

Medical staff membership is an integral

part of a physician's practice. The practice of obstetrics and gynecology necessarily requires medical staff membership and the availability of hospital facilities. Substantially all of Mahmoodian's patients must be hospitalized at some time during their treatment. The denial of medical staff membership effectively denies an obstetrician/ gynecologist the right to exercise his profession and is devastating to the professional life of such a physician. Mahmoodian has been denied the right to exercise his profession in the Harrison County area because UHC enjoys a monopoly in hospital services in the area. In addition, public access to medical care is affected as well. The economic deprivation of a right to earn a living and public access to medical care dictate that procedural due process be preserved.

There is a split of authority among the various jurisdictions on whether there is sufficient nexus between so-called private hospitals and the state for such hospitals to be treated as public for purposes of staff privileges.

Many state courts have shown a willingness to review actions of private hospitals on the ground that private hospitals are sufficiently involved with public interest to warrant judicial intervention. Greisman v. Newcomb Hospital, 40 N.J. 389, 192 A.2d 817 (1963); Woodard v. Porter Hospital, 125 Vt. 419, 217 A.2d 37 (1966); Reiswig v. St. Joseph's Hospital and Medical Center, 130 Ariz. 164, 634 P.2d 976 (1981); Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 281 A.2d 589 (1971); Miller v. National Medical Hospital of Monterey Park, Inc., 124 Cal. App.3d 81, 177 Cal. Rptr. 119 (1981);

Silver v. Castle Memorial Hospital, 53 Haw. 475, 497 P.2d 564 (1972); Kelly v. St. Vincent Hospital, 102 N.M. 201, 692 P.2d 1350 (App. 1984).

In Greisman v. Newcomb Hospital, 40 N.J. 389, 192 A.2d 817 (1963), plaintiff graduated from the Philadelphia College of Osteopathy with a degree of doctor of osteopathy. He was not considered for staff privileges at defendant hospital because hospital bylaws required that an applicant be a graduate of a medical school approved by the American Medical Association and be a member of the County Medical Society, which plaintiff was not.

Plaintiff filed suit demanding that his application to Newcomb Hospital be considered without regard to the aforesaid requirements. Newcomb maintained that it is a private hospital and that judicial review of its refusal to consider

plaintiff's application for membership was improper.

The court stated that while "[hospitals] are private in the sense that they are nongovernmental they are hardly private in other senses." Greisman, 192 A.2d 817, 821. The court recognized that Newcomb is a non-profit organization dedicated to the vital public service of administering to the sick and injured; its funds are in good measure received from public sources and public solicitation and its tax benefits are received because of its non-profit and non-private aspects. Moreover, it constitutes a virtual monopoly in the area in which it functions. Greisman, 192 A.2d 817, 824.

The court concluded that while the managing officials may have discretionary powers in the selection of medical staff, those powers are deeply imbedded in public

aspects, and must be viewed as fiduciary powers to be exercised for the public good. Thus, judicial review of the hospital's refusal to consider plaintiff's application was held proper because of the hospital's involvement with public good.

The Greisman rationale was also followed in Davidson v. Youngstown Hospital Assn., 19 Ohio App.2d 246, 250 N.E.2d 892 (1969); Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal.3d 541, 116 Cal. Rptr. 245, 526 P.2d 253 (1974); and Blende v. Maricopa County Medical Society, 96 Ariz. 240, 393 P.2d 926 (1964).

The reasoning underlying the foregoing cases likewise requires that due process safeguards apply to hospital actions regarding staff privileges. Hospitals are conducted solely for the benefit of the general public. Decisions made by the governing boards directly affect the

public. Thus, the power to grant or withhold staff privileges is fiduciary in nature and due process safeguards must apply to insure the fiduciary power is exercised for the public good.

Disregarding the public-private dichotomy is appropriate considering the pervasive involvement by state, federal and self-governing bodies with hospital functions. The court in Silver v. Castle Memorial Hosp., 53 Haw. 475, 497 P.2d 564 (1972), cert. denied, 409 U.S. 1048 (1972), correctly recognized that:

> "A private nonprofit hospital, which receives part of its funds from public sources and through public solicitation, which receives tax benefits because of its nonprofit and nonprivate aspects and which constitutes a virtual monopoly in the area in which it functioned, is a 'private hospital' in the sense that it is nongovernmental, but that it is in no position to claim immunity from public supervision and control because of its private nature."

It is submitted that the Health Care Quality Improvement Act of 1986 (the "Act") and the West Virginia Health Care Peer Review Organization Protection Act provide additional basis for providing due process protection to a hospital's action to terminate staff privileges. Under the Act, physicians individually are given a qualified immunity from private suit in certain medical peer review activities. Thus, a physician may act without deliberation or recklessly, comfortable in the knowledge that he or she will not have to answer for such action. The Fourteenth Amendment due process safeguards are necessary to protect against such reckless conduct.

Governmental involvement in private hospital operations has become so pervasive that private hospitals truly are instrumentalities of the state. The West

Virginia Legislative Rules of the Department of Health govern the licensing and maintenance of all hospitals. These regulations and the Health Care Cost Review Authority effectively limit the bed capacity within a given geographical area. By limiting licensure of hospitals and bed capacity in a given geographical area, the state controls the hospital facilities available to the public. The state, through licensure procedure, governs the planning for adequate hospital care throughout the state. Hospitals which are granted the privilege of a license are thus instruments of the state performing the state's function of serving the sick and injured.

The Hospital Licensure Rules and Regulations regulate nearly every aspect of hospital operations, including medical staffing. Section 14.1.1 dictates that

medical staff be appointed in accordance with bylaws, rules and regulations of the governing body of the hospital.

In addition to state governmental regulation of hospital licensing and staff appointments, public and private hospitals alike are subject to governance by the Joint Commission on Accreditation of Hospitals (JCAH). Most certainly the JCAH was established as a self-governing body to avoid federal and state regulation of accreditation. This, too, evidences the public function of private hospitals.

While UHC is a private organization in the sense that it was founded by private persons, that is where its private characteristics end. Private persons do not profit by its decisions as with private corporations. Every decision affects the public, especially staff appointments. Government has a voice in its management

and control, in the formulation of its rules, in the management of its affairs and in the appointment of its medical staff. Furthermore, UHC was constructed in part with public (Hill-Burton) funds and is presently receiving public benefits, and UHC is incorporated into the state's plan for providing hospital facilities to the public. The hospital's activities are so entwined with governmental policies that its actions may be deemed state action. UHC has acknowledged this public status. In an article which appeared in the Clarksburg Telegram (a local newspaper), a hospital spokesperson stated "UHC is owned by the community. We built it, we paid for it, it's there and we need to keep it running...that's why we've turned to the community for help."

To terminate staff privileges of Dr. Mahmoodian will virtually end the practice

of medicine for him. He does not have staff privileges at any other hospital and therefore cannot treat patients at another facility, and even if he did have staff privileges at another hospital, it would be unfair to the patients to require them to travel to an adjoining county for hospitalization. We submit that hospital staff decisions affect the fundamentally vested property interest in the pursuit of one's livelihood requiring application of procedural due process safeguards. Anton v. San Antonio Community Hospital, 19 Cal.3d 802, 567 P.2d 1162 (1977).

The economic impact upon Dr. Mahmoodian by terminating his staff privileges is devastating and the impact upon his patients is terrifying and could result in a multitude of liability claims against both Mahmoodian and UHC. Case law, public policy and logic support the abolition of

the public-private dichotomy and demand application of due process safeguards to all hospital actions to terminate medical staff privileges.

Minimum due process protection requires notice of the conduct which may provide basis for termination and the right to cross-examine accusers, which minimum rights were denied to Mahmoodian.

In Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (W.D. N.C. 1974), the district court stated:

> Due process normally requires that [a hospital] . . . allow the doctor full opportunity . . . to question and cross-examine adverse witnesses and accusers, to challenge the accusations of wrongdoing and to present evidence in his own behalf. A necessary element is that the opportunity to defend must be given at a time when it can be effective. Unless the defense can speak at a time when there is a chance to be heard fairly the opportunity to speak is a hollow one.

In Milford v. People's Community Hospital Authority, 155 N.W.2d 835 (Mich. 1968), the court stated that the minimum due process protections to be afforded by a public hospital before staff privileges could be reduced include a reasonably definite statement of the charge or charges lodged against the accused and the right to confront and cross-examine the witnesses who testify against him.

A California appellate court recently held that "fair procedure" requires among other things that there must be adequate notice of charges and an opportunity to confront and cross-examine the accusers. Sywak v. O'Connor Hospital, 199 Cal. App.3d 423, 244 Cal. Rptr. 753 (1988).

The United Hospital Center bylaws Section 11.07(e)(9), states that during the hearing:

> "The affected practitioner shall have the following rights: to call and examine witnesses, to introduce written evidence, to cross-examine any witness on any matter relevant to the issue of the hearing...."

Certainly, it would have created an imminently fairer situation had Mahmoodian been afforded the opportunity to cross-examine witnesses before the Investigative Committee. But, conceding for the purpose of argument that the committee was investigative only and the doctor is not entitled to cross-examine witnesses at that level, Mahmoodian was denied the right of cross-examination before the Hearing Committee, which is the trier of fact, such as a jury is the trier of fact in a civil case. The members of the Investigative Committee appeared and testified as to their interpretation of what other persons said before the Investigative Committee. Clearly,

Mahmoodian was not afforded the minimum procedural protection to which he was entitled by law and under UHC's bylaws.

Section 11.06 of the UHC bylaws provides that corrective action (amounting to termination of staff privileges) may be commenced against a physician:

> "whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medical staff or to be disruptive to the operation of the hospital..."

The accusations against Mahmoodian do not relate to his clinical competence as a physician or that the medical care administered by him has been lower than the standards or aims of the medical staff. To the contrary, the testimony before the committee is that Mahmoodian's competence as a physician is considered high. It

appears abundantly clear from the record in this case that Mahmoodian is being punished by the UHC medical staff because he testified for a few of his patients in medical negligence cases.

It is submitted that the bylaws are not sufficiently specific to notify a staff physician at UHC what conduct is "disruptive to the operation of the hospital." For example, is it disruptive if one talks too loud? Is it disruptive if one jokes with the nurses? Who is to make the judgment as to what act is disruptive?

In order to meet minimum due process requirements, the bylaws must give the doctor some notice of what conduct is not permissible, to the same extent as notice for what is permissible with respect to his clinical competence. This minimum due process requirement was not met in this case.

CONCLUSION

No hospital should be permitted to make a decision to terminate a physician's staff privileges, a decision which could virtually end the career of a competent physician with twenty years experience without providing substantive and procedural due process to protect against reckless, unreasonable and wrongful termination as in this case.

Petitioner respectfully prays that this court consider the grave affects upon the public and Mahmoodian, grant this writ, accord Mahmoodian the process deserved, and reverse the Supreme Court of Appeals of West Virginia.

Dated: July 1, 1991

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1991 Term

No. 19504

SAEED MAHMOODIAN, M.D.,
Plaintiff Below, Appellee

v.

UNITED HOSPITAL CENTER, INC. AND
BRUCE C. CARTER,
Defendants Below, Appellants;
ALI RAHIMIAN, M.D. AND
FLORENCIA C. LOPEZ, M.D.,
Defendants Below

Appeal from the Circuit Court of
Harrison County
Honorable Daniel L. McCarthy,
Chief Judge
Civil Action No. 89-C-25-1

REVERSED

Submitted: January 6, 1991
Filed April 25, 1991

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JUSTICE McHUGH delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. The decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to ensure that the medical staff bylaws afford basic notice and fair hearing

procedures, including an impartial tribunal.

2. A private or a public hospital, regardless of the breadth of discretion that is extended to it, may revoke or otherwise affect adversely the staff appointment or clinical privileges of a medical staff member only if, as an element of basic notice, the medical staff bylaws provide a reasonably definite standard proscribing the conduct upon which the revocation or other adverse action is based.

3. A hospital may adopt and enforce a medical staff bylaw providing that the disruptive conduct of a physician, in the sense of his or her inability to work in harmony with other health care personnel at the hospital, is a ground for denying, suspending, restricting, refusing to renew

or revoking the staff appointment or clinical privileges of the offending physician, when such inability may have an adverse impact upon overall patient care at the hospital.

4. The decision of a private hospital revoking or otherwise affecting adversely the staff appointment or clinical privileges of a medical staff member will be sustained when, as an element of fair hearing procedures, there is substantial evidence supporting that decision.

McHugh, Justice:

This appeal involves the revocation of a physician's staff appointment privileges as a member of the medical staff of a private hospital. The issues include whether such a revocation is subject to judicial review and, if so, the scope of that review, as well as whether such a

revocation may be premised exclusively upon disruptive behavior of a competent physician which may affect adversely the quality of patient care at the hospital. We conclude that the Circuit Court of Harrison County improperly granted a permanent injunction against the revocation of medical staff appointment privileges in this case and, accordingly, we reverse, for the reasons stated in this opinion.

I.

PROCEDURAL HISTORY

The record in this case is voluminous, reflecting both the many steps in the decision-making process and the thoroughness of the evidence received.

The appellants, two of the defendants below, are the United Hospital Center, Inc., of Clarksburg, West Virginia ("UHC"), and Bruce C. Carter, UHC's president.[1] The

appellee, the plaintiff below, is Saeed Mahmoodian, M.D. ("Dr. Mahmoodian"). Dr. Mahmoodian is a physician, licensed to practice medicine in the State of West Virginia. He is board certified in obstetrics and gynecology. He had been granted medical staff appointment privileges in obstetrics and gynecology at UHC or its predecessor corporation for about eighteen years at the time the complaint for injunctive relief was filed in the circuit court. Dr. Mahmoodian does not have medical staff appointment privileges at any other hospital and is not licensed to practice medicine in any other state.

UHC is a private, not-for-profit hospital incorporated under the laws of the State of West Virginia. It was created voluntarily by private individuals. It is

operated by an elected board of directors. It is not owned or operated by any governmental entity.[2]

A. Proceedings Before the Medical Staff

In February, 1988, UHC commenced against Dr. Mahmoodian the "corrective action" process at issue here, pursuant to articles VII and VIII of UHC's medical staff bylaws. Dr. Mahmoodian was notified in writing of the charges, including "a practice of harassment of employees and physicians" at UHC. An ad hoc investigative committee, consisting of four members of UHC's medical staff who were not obstetricians/gynecologists, was formed, even though the medical staff bylaws did not require such a committee. The investigative committee heard informal testimony and received affidavits. Dr. Mahmoodian informally testified before the

investigative committee. He was allowed to be represented by an attorney at the investigative committee proceedings.

The investigative committee ultimately recommended unanimously that Dr. Mahmoodian's medical staff appointment privileges at UHC be revoked for a virtually continuous pattern of disruptive and unprofessional behavior affecting UHC's medical staff physicians and obstetrical nurses and patients. This behavior had created a work environment detrimental to the delivery of quality patient care.[3]

The executive committee of the medical staff, consisting of fourteen of the ninety medical staff members, adopted unanimously the investigative committee's recommendation. The only obstetrician/gynecologist on the medical staff executive committee abstained from

voting.[4] Dr. Mahmoodian thereafter requested and received an evidentiary hearing before an ad hoc hearing committee consisting of three medical staff members who were not obstetrician/gynecologists and who had not participated in the investigative process. An impartial local attorney served as a hearing officer. With the agreement of the hearing committee, both Dr. Mahmoodian and the executive committee of the medical staff were represented by an attorney at the evidentiary hearing before the hearing committee. The hearing committee heard live testimony, including Dr. Mahmoodian's. In addition, both the executive committee, over Dr. Mahmoodian's objection, and Dr. Mahmoodian were permitted to submit hearsay testimony.[5] Dr. Mahmoodian was afforded the opportunity to

cross-examine any witness at the evidentiary hearing and to call his own witnesses.

After the evidentiary hearing the hearing committee confirmed unanimously the medical staff executive committee's recommendation to revoke Dr. Mahmoodian's medical staff appointment privileges at UHC. Pursuant to § 8.05(h) of UHC's medical staff bylaws, the hearing committee concluded that the medical staff executive committee's recommendation did not "lack any factual basis" and was not "arbitrary, unreasonable or capricious." The hearing committee found that the weight of the evidence indicated that Dr. Mahmoodian had instigated the turmoil and hostility in the obstetrical department of UHC and that the potential existed that such behavior would affect patient care adversely. Revocation

was recommended in lieu of less severe discipline because Dr. Mahmoodian previously had been reprimanded formally on one occasion, and his medical staff appointment privileges had been suspended for a year on another occasion, for similar conduct. In addition, Dr. Mahmoodian refused to accept any responsibility for any of the turmoil in the obstetrical department of UHC.

The entire medical staff of UHC subsequently received Dr. Mahmoodian's written response to the charges and thereafter voted 32-17 to recommend to UHC's board of directors that Dr. Mahmoodian's medical staff appointment privileges be revoked. No obstetrician/gynecologist on the medical staff voted.

B. Proceedings Before the Hospital Board

Dr. Mahmoodian, accompanied by an attorney, later met with the appellate review committee of UHC's board of directors. The appellate review committee sat as an appellate body, under UHC's medical staff bylaws, to review the personnel decision of the medical staff. In December, 1988, the appellate review committee of UHC's board of directors affirmed the medical staff's decision to revoke Dr. Mahmoodian's medical staff appointment privileges, effective at the end of the day on January 31, 1989, and Dr. Mahmoodian was notified in writing of that decision. No obstetrician/gynecologist and no person who had participated in any of the medical staff proceedings voted as a member of the board of directors' appellate review committee.

C. Proceedings Before the Circuit Court

Dr. Mahmoodian subsequently brought a civil action in the Circuit Court of Harrison County, West Virginia ("the trial court"), primarily to obtain an injunction against UHC's revocation of Dr. Mahmoodian's medical staff appointment privileges. After a hearing the trial court, in February, 1989, denied Dr. Mahmoodian's request for a preliminary injunction. Thereafter, Dr. Mahmoodian requested this Court to grant a preliminary injunction. In April, 1989, this Court granted Dr. Mahmoodian's request for a preliminary injunction.[7] On November 30, 1989, the trial court, feeling "constrained to defer" to this Court's ruling granting a preliminary injunction, entered an order granting the permanent injunctive relief requested by Dr. Mahmoodian. The trial

court did not, however, change its findings of fact made when earlier denying a preliminary injunction.

UHC and its president, Mr. Carter, have brought this appeal. This Court is the seventh body to hear this matter (after the investigative committee, the medical staff executive committee, the hearing committee, the full medical staff, the appellate review committee of the hospital's board of directors and the circuit court).

II.

SCOPE OF JUDICIAL REVIEW

A. The Law

The threshold question in this case is whether the revocation of a physician's medical staff appointment privileges at a private hospital is subject to judicial review and, if so, what is the scope of that review.

In syllabus point 4 of State ex rel. Sams v. Ohio Valley General Hospital Association, 149 W. Va. 229, 140 S.E.2d 457 (1965), the Court held that "[t]he governing authorities of a private hospital, in the exercise of their discretion, have the absolute right to exclude licensed physicians from its medical staff and such action is not subject to judicial review." (emphasis added) Sams involved, however, the denial of an initial appointment to a private hospital's medical staff and did not speak to the precise question presented here, specifically, whether a decision of a private hospital adversely affecting a medical staff member's previously granted privileges at that hospital is subject to judicial review.[8]

Utilizing breach of contract principles, most courts explicitly addressing the issue presented here have held, and we hereby hold, that the decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to ensure that the medical staff bylaws afford basic notice and fair hearing procedures, including an impartial tribunal. See, e.g., Shulman v. Washington Hospital Center, 222 F. Supp. 59, 63, 64 (D.D.C. 1963); Eidelson v. Archer, 645 P.2d 171, 175 n. 13 (Alaska 1982) (citing cases from other jurisdictions); Gaenslen v. Board of

Directors, 185 Cal. App. 3d 563, 568, 232 Cal. Rptr. 239, 241-42 (1985); Gianetti v. Norwalk Hospital, 211 Conn. 51, 61-67, 557 A.2d 1249, 1254-56 (1989) (citing cases from other jurisdictions); Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 506-07, 509-10, 514, 544 N.E.2d 733, 737-38, 739, 741 (1989); Pepple v. Parkview Memorial Hospital, Inc., 536 N.E.2d 274, 276 (Ind. 1989); Porter Memorial Hospital v. Malak, 484 N.E.2d 54, 61 (Ind. Ct. App. 1985); State ex rel. Willman v. St. Joseph Hospital, 684 S.W.2d 408, 411, 412 (Mo. Ct. App. 1984), application to transfer denied (Mo. Feb. 26, 1985); syl. pt. 2, Gotsis v. Lorain Community Hospital, 46 Ohio App. 2d 8, 345 N.E.2d 641 (1974) (citing, in body of opinion, cases from other jurisdictions); Miller v. Indiana Hospital, 277 Pa. Super. 370 _____-____, ____, 419

A.2d 1191, 1193-94, 1196 (1980), appeal denied (Pa. Oct. 1, 1980).[9]

The judicial reluctance to review the medical staffing decisions of private hospitals, by way of injunction, declaratory judgment or otherwise, reflects the general unwillingness of courts to substitute their judgment on the merits for the professional judgment of medical and hospital officials with superior qualifications to make such decisions. Furthermore, a private hospital's actions do not constitute state action and, therefore, are not subject to scrutiny for compliance with procedural "due process," which is constitutionally required when there is state action. However, there are basic, common-law procedural protections which must be accorded a medical staff member by a private hospital in a

disciplinary proceeding which could seriously affect his or her ability to practice medicine. Such basic procedural protections include notice of the charges and a fair hearing before an impartial tribunal. If a private hospital's medical staff bylaws provide these basic procedural protections, and if the bylaws' procedures are followed substantially in the particular disciplinary proceeding, a court usually will not interfere with the medical peers' recommendation and the hospital's exercise of discretion on the merits. See, e.g., Adkins v. Sarah Bush Lincoln Health Center, 129 Ill. 2d 497, 507, 509-10, 514, 544 N.E.2d 733, 738, 739, 741 (1989); Friedman v. Memorial Hospital of South Bend, Inc., 523 N.E.2d 252 (Ind. Ct. App. 1988).

In this regard the fact that individuals conducting good-faith health care peer review are statutorily immunized from civil liability for damages evinces a public policy encouraging health care professionals to monitor the competency and professional conduct of their peers in order to safeguard and improve the quality of patient care. See W. Va. Code, 30-3C-1 to 30-3C-3, as amended; 42 U.S.C. §§ 11101-11152, as amended.[10] While these peer review immunity statutes do not foreclose judicial review in proceedings seeking injunctive or declaratory relief, see H. R. Rep. No. 903, 99th Cong., 2d Sess. 9, reprinted in 1986 U.S. Code Cong. & Adm. News 6384, 6391, it is evident that the intent of these statutes was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their

judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise.[11]

Further support for the conclusion that judicial review of health care peer review decisions should be narrow in scope is furnished by the fact that, under the last paragraph of W. Va. Code, 30-3-14(b) [1986, 1989], "any disposition of a [medical licensing] case by the [West Virginia] board [of medicine] does not preclude any action by a hospital, other health care facility or professional society . . to suspend, restrict or revoke the privileges or membership of such physician[.]" Again, the legislative intent for medical staffing decisions is to defer generally to the judgment and discretion of the health care peers and hospital governing authorities.

We note, too, that there is no statute in this case expressly providing for appellate review by the courts of health care peer review decisions. This fact suggests a legislative intent that there be a limited scope of judicial review in proceedings invoking, for example, the extraordinary jurisdiction of courts to award injunctions. "In so specialized and sensitive an activity as governing a hospital, courts are well advised to defer to those with the duty to govern." Nanavati v. Burdette Tomlin Memorial Hospital, 107 N.J. 240, 251, 526 A.2d 697, 702-03 (1987). Underlying the limited scope of judicial review of health care peer review decisions is an awareness that courts should allow hospitals, as long as they proceed fairly, to run their own business. That awareness is tempered by

the recognition that physicians need hospital medical staff appointment privileges and clinical privileges to serve their patients; therefore, hospitals must treat physicians fairly in making decisions about those privileges. Id. at 249-50, 526 A.2d at 702.

B. Fairness of Hearing Procedures Here

Dr. Mahmoodian claims that UHC in one aspect did not comply substantially with the bylaws of its medical staff[12] and in another aspect did not provide a fair procedure for revocation of his staff appointment privileges. This Court disagrees.

Dr. Mahmoodian contends that it was an unfair procedure to allow members of the investigative committee to testify before the hearing committee as to their interpretation of what other persons had

said before the investigative committee. Dr. Mahmoodian argues that this procedure, over his objection at the time, denied him his right to confront and cross-examine these other persons not appearing as witnesses at the evidentiary hearing before the hearing committee.

Dr. Mahmoodian was not denied his right to cross-examine those persons who were witnesses at the evidentiary hearing. The medical staff and the hospital lacked the power to subpoena persons to be witnesses. The hearsay testimony in question certainly was not the only evidence before the hearing committee; there was substantial evidence supporting the charges of disruptive conduct by Dr. Mahmoodian and supporting the finding that such conduct was creating a work environment detrimental to the quality of patient care. On the

critical question of whether Dr. Mahmoodian's disruptive conduct could threaten the care of obstetrical patients at the hospital, Dr. Mahmoodian had full opportunity at the evidentiary hearing to cross-examine the members of the investigative committee whose opinions it was that Dr. Mahmoodian's conduct put obstetrical patients at risk. In addition, prior to the evidentiary hearing, Dr. Mahmoodian had access to the written materials relied upon by the medical staff executive committee, and Dr. Mahmoodian had the opportunity at the evidentiary hearing to rebut the adverse evidence. The record indicates that he was thoroughly prepared to rebut all of the adverse evidence at the evidentiary hearing. It is interesting to note in this regard that Dr. Mahmoodian utilized the same form of evidence about

which he complains, by submitting a few favorable letters from third parties who were not witnesses at the evidentiary hearing.

The procedure in question was reasonable for peer review. Silver v. Castle Memorial Hospital, 53 Haw. 475, 485, 497 P.2d 564, 571, 572, cert. denied, 409 U.S. 1048, 93 S. Ct. 517, 34 L. Ed. 2d 500 (1972); Miller v. Indiana Hospital, 277 Pa. Super. 370, _____, 419 A.2d 1191, 1194 (1980), appeal denied (Pa. Oct. 1, 1980). The procedure here certainly complied with the medical staff bylaws, which authorized an evidentiary hearing without strict adherence to evidentiary rules applicable to civil or criminal trials in courts of law. See supra note 5. Also, each of the procedural rights afforded Dr. Mahmoodian would satisfy the hearing standards

established by the Federal Health Care Quality Improvement Act of 1986. 42 U.S.C. §11112(b)(3) (1988).[13]

As found by the trial court, there was substantial compliance with the hospital's medical staff bylaws in this case, and we believe that those bylaws afforded Dr. Mahmoodian basic notice and fair hearing procedures.

III.

BYLAWS ON DISRUPTIVE CONDUCT

Dr. Mahmoodian challenges the revocation of his medical staff appointment privileges upon the basis of his disruptive conduct. He asserts: (1) that the medical staff bylaws are vague on this point; (2) that disruptive conduct of a medical staff member does not constitute a legally sufficient ground for revoking or otherwise affecting adversely a medical staff

member's staff appointment privileges at a hospital, unless there is a "substantial" and "specific" threat to patient care from that conduct; and (3) that there was insufficient evidence supporting the hospital's decision to revoke his staff appointment privileges. This Court disagrees with each of these assertions.

A. Vagueness of Disruptive Conduct Bylaws

The pertinent part of section 7.01 of UHC's medical staff bylaws provides:

> Whenever the activities or professional conduct of any practitioner with clinical privileges are considered to be lower than the standards or aims of the medical staff or to be disruptive to the operations of the hospital or if any such practitioner is exercising or intending to exercise unauthorized clinical privileges, corrective action against such practitioner may be requested[.]

(emphasis added) In addition, section 3.02 of UHC's medical staff bylaws provides, in relevant part, that one of the qualifications for membership is "an ability to work with others" so as to assure the medical staff and the hospital's governing board "that any patient treated by [the physician in question] will be given a high quality of medical care[.]" (emphasis added)

Consistent with the authorities elsewhere, such as McElhinney v. William Booth Memorial Hospital, 544 S.W.2d 216 (Ky. 1976), this Court holds that a private or a public hospital, regardless of the breadth of discretion that is extended to it, may revoke or otherwise affect adversely the staff appointment or clinical privileges of a medical staff member only if, as an element of basic notice, the

medical staff bylaws provide a reasonably definite standard proscribing the conduct upon which the revocation or other adverse action is based. Id. at 218.[14]

Here, the medical staff bylaws proscribe professional conduct which is "disruptive to the operations of the hospital," and the bylaws require a medical staff member to have "an ability to work with others" in the sense that high quality patient care will be provided. Identically worded medical staff bylaws were before the court in, for example, McMillan v. Anchorage Community Hospital, 646 P.2d 857 (Alaska 1982), and the court there decided that a post-hearing revocation of staff appointment privileges, rather than a prehearing suspension, would have been proper, under the circumstances, for a physician's disruptive conduct, that is,

the inability of the physician to work with others. The court believed the relevant bylaws were clear. Id. at 858 n. 1, 862, 867. See also Huffaker v. Bailey, 273 Or. 273, 275-76, 540 P.2d 1398, 1399-1400 (1975) (medical staff bylaws requiring physicians' ability to work with others to assure "high quality of medical care" was not impermissibly vague).

Accordingly, we believe sections 7.01 and 3.02 of the medical staff bylaws in this case set forth a reasonably definite standard of professional conduct for purposes of basic notice to medical staff members as to what behavior is and is not expected of them. Moreover, in this particular case, given Dr. Mahmoodian's history as far back as 1974 of seven other "corrective actions" by the medical staff for similarly disruptive behavior, his

assertion that he did not know what constituted such behavior is implausible.

B. Disruptive Conduct as Ground for Revocation

In making medical staffing decisions a private or a public hospital may consider factors in addition to technical medical skills or medical competence. Schlein v. Milford Hospital, 423 F. Supp. 541, 544 (D. Conn. 1976), aff'd on other grounds, 561 F.2d 427 (2d Cir. 1977); Huffaker v. Bailey, 273 Or. 273, 277, 540 P.2d 1398, 1400 (1975). In fact, a hospital may establish, and a court should sustain, a standard for granting or maintaining medical staff appointment or clinical privileges if that standard is rationally related to the delivery of quality health care to patients as a whole. Nanavati v. Burdette Tomlin Memorial Hospital, 107 N.J.

240, 249, 526 A.2d 697, 701 (1987). Thus, a hospital has the right, indeed the duty, to ensure that those persons who are appointed to its medical staff meet certain standards of professional competence and professional conduct, so long as there is a reasonable nexus between those standards and the hospital's mission of providing overall quality patient care. This point was stated in the following manner in Miller v. Eisenhower Medical Center, 27 Cal. 3d 614, 614 P.2d 258, 166 Cal. Rptr. 826 (1980) (en banc):

> [T]he providing of high quality patient care is, quite properly, the primary concern of all hospital institutions. The governing authority bears the responsibility for assuring that this goal is achieved to the greatest extent possible, and its decisions relating to medical staff must take into account all factors which have a legitimate relationship to it. . . . [A]n applicant's [or a medical staff member's] ability to work with other medical personnel in the

> hospital setting may . . . have a clear effect on the level of patient care provided.

27 Cal. 3d at 628-29, 614 P.2d at 267, 166 Cal. Rptr. at 835.

The importance of professional conduct, as well as professional competence, is also shown by the fact that regulations of the State Division of Health of the State Department of Health and Human Resources provide that the medical staff shall be accountable to the hospital's governing body for the quality of medical care which is provided to hospital patients and for the ethical and professional conduct of its members while functioning in the hospital. Thus, the members of the hospital's medical staff must be legally, professionally and ethically qualified. 5 W. Va. Code of State Rules §§ 64-12-14.1.1,

64-12-14.1.1(c)(3) (1987). In this regard the ethical standards established by the American College of Obstetricians and Gynecologists, of which Dr. Mahmoodian is a member, advise a member not to "use opportunities arising out of contact with patients, colleagues, or the general public for self-aggrandizement or for demeaning the reputation of a colleague."

As a specific type of unprofessional conduct, behavior "disruptive to the operations of the hospital" or, stated another way, an inability to work with other health care personnel at the hospital is a matter of legitimate concern to a hospital in making medical staffing decisions. Consequently, virtually all of the courts addressing the issue have held, and this Court hereby holds, that a hospital may adopt and enforce a medical

staff bylaw providing that the disruptive conduct of a physician, in the sense of his or her inability to work in harmony with other health care personnel at the hospital, is a ground for denying, suspending, restricting, refusing to renew or revoking the staff appointment or clinical privileges of the offending physician, when such inability may have an adverse impact upon overall patient care at the hospital. See, e.g., Lipsett v. University of Puerto Rico, 637 F. Supp. 789, 809 (D.P.R. 1986), rev'd on other grounds, 864 F.2d 881 (1st Cir. 1988); Robbins v. Ong, 452 F. Supp. 110, 115 (S.D. Ga. 1978); Schlien v. Milford Hospital, 423 F. Supp. 541, 544 (D. Conn. 1976), aff'd on other grounds, 561 F.2d 427 (2d Cir. 1977); Shulman v. Washington Hospital Center, 222 F. Supp. 59, 64 (D.D.C. 1963); McMillan v.

Anchorage Community Hospital, 646 P.2d 857, 865, 867 & n. 13 (Alaska 1982); Miller v. Eisenhower Medical Center, 27 Cal. 3d 614, 628-29, 614 P.2d 258, 267, 166 Cal. Rptr. 826, 835 (1980) (en banc); Even v. Longmont United Hospital Association, 629 P.2d 1100, 1103 (Colo. Ct. App. 1981); Silver v. Castle Memorial Hospital, 53 Haw. 475, 479, 497 P.2d 564, 568, cert. denied, 409 U.S. 1048, 93 S. Ct. 517, 34 L. Ed. 2d 500 (1972); Ladenheim v. Union County Hospital District, 76 Ill. App. 3d 90, 98, 394 N.E.2d 770, 776 (1979); Yarnell v. Sisters of St. Francis Health Services, Inc., 446 N.E.2d 359, 363 (Ind. Ct. App. 1983); Bricker v. Sceva Speare Memorial Hospital, 111 N.H. 276, 280-81, 281 A.2d 589, 592-93, cert. denied, 404 U.S. 995, 92 S. Ct. 535, 30 L. Ed. 2d 547 (1971); Nanavati v. Burdette Tomlin Memorial Hospital, 107 N.J.

240, 252-55, 526 A.2d 697, 703-05 (1987); Van Campen v. Olean General Hospital, 210 A.D. 204, 208, 205 N.Y.S. 554, 556-57 (1924), aff'd mem., 239 N.Y. 615, 147 N.E. 219 (1925); Straube v. Emanuel Lutheran Charity Board, 287 Or. 375, 384, 600 P.2d 381, 387 (1979) (en banc), cert. denied, 445 U.S. 966, 100 S. Ct. 1657, 64 L.Ed. 2d 242 (1980); Huffaker v. Bailey, 273 Or. 273, 278-79, 540 P.2d 1398, 1400-01 (1975); Hagan v. Osteopathic General Hospital, 102 R.I. 717, 726, 232 A.2d 596, 601 (1967). See generally Springer & Casale, Hospitals and the Disruptive Health Care Practitioner--Is the Inability to Work with Others Enough to Warrant Exclusion?, 24 Duq. L. Rev. 377 (1985) (answering that question in the affirmative).

Several of these courts have emphasized that one of the principal reasons for

upholding a "disruptive conduct" bylaw of a hospital's medical staff is that quality patient care in a hospital setting requires "team work" and compatibility between physicians, nurses and other health care personnel.[15]

As stated in the Miller opinion, cited above, the California courts have required a showing of a "substantial" and "specific" threat to patient care as a component of disruptive conduct of a physician justifying a hospital's action adversely affecting that physician's medical staff appointment or clinical privileges. Similarly, as stated in the Nanavati opinion, cited above, the New Jersey courts have required a showing that the physician's disruptive conduct "probably" will have an adverse impact on patient care.

Virtually all of the other courts, however, which have specified the degree of likelihood that overall patient care will be threatened have upheld the right of a hospital to act whenever the physician's disruptive conduct, in the expert opinion of the hospital authorities, "may" or "could" affect adversely overall patient care. This majority view is consistent with the Federal Health Care Quality Improvement Act of 1986, which addresses peer review activity based upon the competence or professional conduct of a physician which "affects or could affect adversely the health or welfare of a patient or patients[.]" 42 U.S.C. § 11151 (9) (1988). We believe the formulation of most courts is reasonable, although we do observe that the potential effect on patient care may not be presumed but must

be shown by the evidence. As even the New Jersey courts have recognized, though, a hospital need not wait for a disruptive physician to harm a patient before revoking a medical staff member's privileges. Nanavati, 107 N.J. at 254, 526 A.2d at 704.

The mere fact that a physician is irascible, however, or that he or she generally annoys other physicians, nurses or administrators does not constitute sufficient cause for termination of his or her hospital privileges. Likewise, a physician should not be removed from medical staff membership merely because he or she has criticized hospital practices or other health care personnel at the hospital. On the other hand, a physician may be so disruptive as to throw the hospital, or a segment of it, into turmoil and to prevent it from functioning

effectively. So substantial a disruption reasonably could lead the hospital authorities to find that overall patient care may be threatened, thereby constituting good cause for termination of the physician's hospital privileges.

In the present case the pertinent bylaws are quoted at the outset of section III.A. of this opinion, supra. Section 3.02 of UHC's medical staff bylaws explicitly links (1) the ability to work with others and (2) its effect on patient care at the hospital. Reading section 7.01 of the bylaws in the same fashion, that is, as requiring a showing that the professional conduct is so "disruptive to the operations of the hospital" that it may have an adverse impact upon overall patient care at the hospital, this Court concludes that these two bylaws are substantively

reasonable.

C. Sufficiency of the Evidence

Dr. Mahmoodian finally argues that there was insufficient evidence to support UHC's decision to revoke his staff appointment privileges.

While some courts refuse to review the sufficiency of the evidence to support a private hospital's decision adversely affecting a medical staff member's hospital privileges, see e.g., Pepple v. Parkview Memorial Hospital, Inc., 536 N.E.2d 274, 276 (Ind. 1989), and while the expertise of the medical peers and the discretion of the governing body of a private (or a public) hospital with respect to medical staffing decisions are entitled to judicial deference, an inherent element of "fair hearing procedures" is a requirement of sufficient evidence to support the

hospital's decision, a matter to be determined by a court in a proceeding seeking injunctive or declaratory relief.

Other courts have stated in various terms the amount of evidence necessary upon judicial review to support a private hospital's decision affecting adversely a medical staff member's hospital privileges. See, e.g., Even v. Longmont United Hospital Association, 629 P.2d 1100, 1103 (Colo. Ct. App. 1981) ("findings of the board were supported by competent evidence, and are binding on review"); Straube v. Emanuel Lutheran Charity Board, 287 Or. 375, 384, 600 P.2d 381, 386 (1979) (en banc) ("evidence from which it could be found that [physician's] conduct posed a threat to patient care"), cert. denied, 445 U.S. 966, 100 S. Ct. 1657, 64 L. Ed. 2d 242 (1980). Regardless of the phraseology of

these courts, the prevailing standard for judicial review of the findings of a private hospital in these decisions affecting medical staff members' privileges appears to be either an arbitrary and capricious (or abuse of discretion) standard or a substantial evidence standard.

Consistent with these authorities, this Court holds that the decision of a private hospital revoking or otherwise affecting adversely the staff appointment or clinical privileges of a medical staff member will be sustained when, as an element of fair hearing procedures, there is substantial evidence supporting that decision. For a definition of "substantial evidence" for purpose of judicial review see West Virginia Institute of Technology v. West Virginia Human Rights Commission, ___ W.

Va. _____, _____, 383 S.E.2d 490, 497-98 (1989).

Some of the more egregious incidents supporting the hospital's decision in this case include the following.

Dr. Mahmoodian interfered with a lymph node biopsy being performed by his archrival, another obstetrician/ gynecologist, Dr. Rahimian. When Dr. Mahmoodian thought he had discovered evidence that Dr. Rahimian was performing a surgical procedure for which he was not privileged, he (Dr. Mahmoodian) strode into the operating room suite and demanded that a nurse, who was the operating room coordinator, stop Dr. Rahimian's surgery. Dr. Mahmoodian did not follow the appropriate procedure of complaining before the surgery to the chief of surgery or to the chief of the medical staff. Dr.

Mahmoodian waited until the case was in progress before demanding of the nurse that the procedure be stopped. The danger to patient care is obvious.

In the case of a patient named Virginia Edgell, one of the hospital's family practice residents called Dr. Mahmoodian at 1:30 a.m. and requested a caesarean section evaluation on this patient, who had been in labor for fifteen to sixteen hours and had had no progress for about eight hours. Dr. Mahmoodian did not come to the hospital to see the patient but advised that the patient could wait until morning. The physician supervising the family practice residents suggested that it was reasonable to obtain a second opinion. Dr. Rahimian was consulted, came to the hospital, evaluated the patient and performed a caesarean section. The next morning, when

Dr. Mahmoodian learned that Dr. Rahimian had done a caesarean section on the patient, he (Dr. Mahmoodian) wrote a consultation note in the chart, the accuracy of which the family practice resident disputed. In the note Dr. Mahmoodian stated that he had told the resident he would come to the hospital in the morning and do a section, or, if the resident wanted him before then, he could call and Dr. Mahmoodian would come in. The resident testified that Dr. Mahmoodian had told him not to call back unless a problem developed with the fetal heart monitor and that the patient could wait until morning. Dr. Mahmoodian's actions in this case prompted the chief of the medical staff to warn Dr. Mahmoodian in writing to come to the hospital to evaluate patients when called by a resident. Again, the threat to

patient care is obvious.

The obstetrical department nurse manager testified that Dr. Mahmoodian refused to give verbal orders to the registered nurses with whom he was feuding. Instead, he would give such orders to licensed practical nurses only, who, as he knew, were not authorized under hospital policy to accept verbal orders from a physician. That practice made it necessary for a registered nurse to whom he would speak to call back to Dr. Mahmoodian to receive formally the order. The impact of this circuity was that orders were delayed and quality patient care was implicated.

The record also documents the loss of at least one obstetrician/gynecologist candidate recruited by the hospital, due to Dr. Mahmoodian's behavior and remarks.

This fact evinces the threat Dr. Mahmoodian represents to the continued viability of this critical health service at UHC.

The record is replete with other evidence supporting the hospital's decision to revoke Dr. Mahmoodian's staff appointment privileges. In short, there was substantial evidence supporting that decision. Such decision was reached reluctantly by the hospital, but the record establishes that this drastic action was based upon the informed recommendation of the medical peers after fair hearing procedures and was within the sound discretion of the hospital.[16]

Accordingly, this Court reverses the final order of the Circuit Court of Harrison County granting Dr. Mahmoodian's request for a permanent injunction against the hospital's revocation of his medical

staff appointment privileges.

Reversed.

FOOTNOTES

[1]The other two defendants named below, Ali Rahimian, M.D., and Florencia C. Lopez, M.D., are not parties to this appeal.

[2]Dr. Mahmoodian contends that UHC is a "state actor" which must adhere to federal and state constitutional "due process" requirements when deciding to revoke or otherwise to affect adversely the medical staff appointment privileges of a physician. In support of this contention Dr. Mahmoodian argues that UHC serves the public interest in community health; receives funds from governmental sources; and is subject to some governmental regulation, such as licensing, health care cost containment, statutorily required consumer representation on hospital boards of directors and statutorily required open proceedings of hospital boards of directors.

The Court rejected such a public entity argument in State ex rel. Sams v. Ohio Valley General Hospital Association, 149 W. Va. 229, 140 S.E.2d 457 (1965) (syl. pts. 2-3 and 149 W. Va. at 234-37, 140 S.E.2d at 460-62). See also Queen v. West Virginia University Hospitals, Inc., __ W. Va. ___, _____-____, 365 S.E.2d 375, 383-85 (1987) (public hospital; Sams distinguished); Orteza v. Monongalia County General Hospital, _____ W. Va. ___, ___-___, 318 S.E.2d 40, 43-45 (1984) (Sams quoted approvingly in light of United States Supreme Court cases and other post-1973 federal cases discussed). The contrary opinion in Sams v. Ohio Valley General Hospital Association, 413 F.2d 826, 828

(4th Cir. 1969) (receipt of federal funds converts private hospital into governmental actor), was overruled in Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023, 1025-26 (4th Cir. 1982), in light of United States Supreme Court opinions after 1973.

This Court believes that an extensive discussion of this public hospital/private hospital dichotomy distracts attention from more significant issues in this case. The limited record before us on the point supports the factual finding of the Circuit Court of Harrison Count that UHC is a private hospital for purposes of personnel decisions. Our analysis will, therefore, be based upon UHC's private status.

We do note that the scope of judicial review of health care peer review decisions adversely affecting the privileges of a medical staff member is essentially the same for private and public hospitals. While such decisions of public hospitals must be reached after affording "due process," and such decisions of private hospitals must be reached after affording "fair procedures," recent federal legislation will encourage essentially all hospitals to use the same procedures. See infra note 10.

[3]The investigative committee also recommended that Dr. Mahmoodian's clinical privileges to perform a certain type of surgery (a Wertheim, or "radical," hysterectomy with pelvic lymphadenectomy) be suspended, due to apparent inexperience or incompetence, even if Dr. Mahmoodian's medical staff appointment privileges would

not be revoked completely. This appeal does not involve that matter.

[4]Dr. Mahmoodian's contention to the contrary notwithstanding, UHC's medical staff bylaws did not require any investigative committee's recommendation to be submitted initially to the entire medical staff. This executive committee of the medical staff was empowered under the bylaws to vote upon the investigative committee's recommendation prior to submission of the matter to the entire medical staff. Submission of the matter to the entire medical staff occurred here after the hearing committee's recommendation. The medical staff bylaws were followed in this regard. Moreover, this procedure avoided any claim that the entire medical staff had "prejudged" the matter by voting on the investigative committee's recommendation prior to voting on the hearing committee's recommendation.

[5]According to § 8.05 (g) of UHC's medical staff bylaws, the hearing need not be conducted strictly according to rules of law relating to the examination of witnesses or presentation of evidence. Instead, any relevant matter upon which reasonable persons customarily rely in the conduct of serious affairs is to be considered, regardless of the existence of any common-law or statutory rule which might make evidence inadmissible over objection in a civil or criminal action in a court of law. As stated in § 8.05 (j) of the medical staff bylaws, the purpose of a hearing is to resolve, on an intraprofessional basis, matters bearing on professional competency and conduct.

[6]Like many private and public health care facilities, UHC's medical staff bylaws had been based upon the model of, and approved by, an independent, nongovernmental organization known as the Joint Commission on the Accreditation of Health Care Organizations, formerly called the Joint Commission on the Accreditation of Hospitals. As required by state regulations, UHC's board of directors had also approved these bylaws. See 5 W. Va. Code of State Rules §64-12-7.2.1(a)(2) (1987).

[7]The trial court later certified certain questions to this Court after denying a motion to dissolve the preliminary injunction. This Court declined to docket the certified questions.

[8]Sams and State ex rel. Bronaugh v. City of Parkersburg, 148 W. Va. 568, 572, 136 S.E.2d 783, 786 (1964) (dicta; public hospital), are consistent with the clear majority rule elsewhere of nonreview by the courts of private hospital's decisions denying initial appointments to such hospitals' medical staffs. For collections of cases on that point, including the approximately ten jurisdictions which follow the minority rule of subjecting private hospital's medical staff initial appointment decisions to judicial review of the merits, see Barrows v. Northwestern Memorial Hospital, 123 Ill. 2d 49, 525 N.E.2d 50 (1988) (following majority rule of nonreview); Hottentot v. Mid-Maine Medical Center, 549 A.2d 365 (Me. 1988) (following majority rule of nonreview); annotation, Exclusion of or Discrimination